J. W. Rex Company *and* United Steelworkers of America, AFL–CIO–CLC. Case 4–CA–17765

August 31, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On June 4, 1991, Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions, as modified below, and to adopt the recommended Order, as modified.

We find, in agreement with the judge, that the Respondent failed to bargain in good faith,[4] in violation of Section 8(a)(5) and (1), on and after November 7, 1988.[5] We also find, in agreement with the judge, that the parties had not bargained to a legally cognizable impasse prior to the Respondent's implementation of its final contract proposal. In so finding, we rely on the Respondent's failure to bargain in good faith, as found above.[6] Unlike the judge, however, we do not find that the Respondent's failure to meet with the Union between November 14, 1988, and March 1989 was unlawful. For the reasons that follow, we find merit in the Respondent's exception to the judge's finding that its conduct in this respect constituted a failure to bargain in good faith.

The Respondent and the Union have been parties to a series of collective-bargaining agreements, the most recent of which expired September 17, 1988.[7] Although the parties bargained in an attempt to reach a successor agreement, the negotiations were not successful, and the employees went on strike when the contract expired. The strike, which is conceded to be an economic strike at all times material,[8] lasted several weeks, during which time several additional negotiating sessions were held, with the participation of Alex Kapner, a representative of the Federal Mediation and Conciliation Service. No agreement was reached, however, and on November 14 the Respondent declared its intention to begin hiring permanent replacements for the strikers.

[1] The Respondent has requested oral argument. The request is denied, as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to the revocation of its subpoena seeking to compel the testimony of Commissioner Alex Kapner of the Federal Mediation and Conciliation Service, who had participated in the 1988 negotiations between the Respondent and the Union. That exception is without merit. Settled public policy clearly prohibits the Board from compelling the testimony of Federal mediators. *Tomlinson of High Point*, 74 NLRB 681, 684–685 (1947).

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We adopt the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by unduly delaying the reinstatement of striking employees after November 16, 1988, because we agree with the judge that the Respondent failed to demonstrate a legitimate and substantial business justification for the delay. See, e.g., *Aztec Bus Lines*, 289 NLRB 1021, 1030 fn. 23 (1988). In this regard, however, we do not rely on the judge's finding that six strikers told the Respondent they would accept recall, but never reported to work after the strike. The record does not support that finding. The record indicates that four of those individuals (Camburn, Fillman, Barber, and K. Smith) informed the Respondent that they were not returning; one (Burycz) was ''on hold''; and only one (Prince) was a ''no show.''

Because we find that the Respondent unduly delayed the reinstatement of the strikers, it is unnecessary for us to decide whether the judge correctly found that the 5-day ''grace period'' normally granted for reinstating ''*unfair labor practice* strikers should be applied to the reinstatement of economic strikers as well. See *Drug Package Co.*, 228 NLRB 108, 113–114 (1977).

[4] In so finding, we do not rely on the Respondent's failure to meet with the Union between November 14, 1988, and March 1989, because, as we explain in the text below, we do not find the failure to meet unlawful. Nor do we rely on the judge's finding that the Respondent's ''envy of nonunion competitors,'' as indicated in a letter to the Respondent's employees, was symptomatic of bad faith in the bargaining process.

In finding bad-faith bargaining, Member Oviatt relies solely on the judge's findings that the Respondent's negotiator took the position that he would consider proposals by the Union only for ''cosmetic changes'' and that in effect he would give a ''quick no'' to any substantive proposals by the Union.

[5] In affirming the judge on this issue, we find that *L. W. Le Fort Co.*, 290 NLRB 344 (1988), cited by the Respondent, is distinguishable from this case. In *Le Fort*, the Board found that the employer had bargained to a valid impasse as of June 1, and was free to implement the terms of its final proposal, which it had made on May 30. On June 11, the employer advanced another proposal, which contained some terms that were less favorable than those of the May 30 offer; the employer also informed the union that if the new offer was not accepted by June 14, it would consider impasse to have been reached, and would withdraw all offers. A majority of the panel (Chairman Stephens dissenting) found that the employer's June 11 actions did not constitute surface bargaining such as to invalidate the *previously reached* impasse. *Le Fort* thus differs from this case, in which the Respondent proposed a contract with less favorable terms than those it had previously offered, indicated in no uncertain terms that it would not countenance any departure from the substantive terms of the new proposal, and then implemented the *newly proposed* terms after declaring impasse.

[6] Consequently, it is unnecessary for us to decide whether the judge correctly found that, even if the Respondent had bargained in good faith, a valid impasse had not been reached at the time the Respondent implemented the terms of its final proposal.

[7] Unless otherwise stated, all dates are in 1988.

[8] Although, as noted above, the Respondent began bargaining in bad faith on November 7, 1988, no party contends that the strike was converted to an unfair labor practice strike.

On November 16, Union Representative Henry Pearson came to the Respondent's plant and met with John Rex, the Respondent's president, and Linda Iltis, its personnel director. Pearson informed Rex and Iltis that the Respondent's final bargaining offer had been rejected by the employees. He then gave Rex a handwritten letter stating that the Union was offering unconditionally to return to work. Rex gave the letter to Iltis, who read it and said ''Okay.'' Pearson then said, ''We'll need to continue negotiating.'' Iltis replied, ''I understand.'' There was no mention of when negotiations would resume or how the next meeting was to be scheduled.

On November 21, Pearson returned to the Respondent's plant, this time with union bargaining committee member Lucien Hendricks. The two met with Iltis in the lobby, and Pearson gave her another letter stating the Union's unconditional offer to return to work. Pearson also reiterated that the Union still wanted to continue negotiations, and Iltis replied, ''All right.''

No negotiations ensued, however, until March 1989. In fact, not until January 1989 did either of the parties contact the other concerning the resumption of bargaining. By letter to John Rex, dated January 19, 1989, Pearson stated that the Union was ''waiting for the Company to continue negotiations.'' He denied that the parties were at impasse, and opined that it was in the best interests of the parties to negotiate as soon as possible. Iltis responded by letter dated January 23, 1989, stating that ''We always have been and will continue to be ready to meet with you at the call of the Federal Mediator.''

The judge found that the Respondent violated Section 8(a)(5) and (1) by disregarding the Union's November requests for continued negotiations. She rejected the Respondent's argument that the Union's requests were communicated directly by Pearson rather than through the mediator, noting that not until late January 1989 did the Respondent indicate a willingness to honor such requests if made through the mediator. We disagree and reverse.

According to the credited testimony, when Pearson indicated on November 16 and 21 that the Union desired to continue negotiations, he did not suggest any dates, or even any general timeframe, for the resumption of talks. Moreover, Pearson admitted on cross-examination that, after Mediator Kapner became involved in the negotiations, Kapner was the one who had to call for meetings.[9] Pearson further conceded that Kapner did not call a meeting between November 14, 1988, and March 1989. Pearson also admitted that the Respondent never refused to meet with the Union, and that the Respondent's negotiators never refused to attend a meeting.

On the basis of this record, we agree with the Respondent that the judge erred in finding that the Respondent unlawfully disregarded the Union's requests for continued negotiations. In the first place, Pearson's remarks to Iltis were hardly explicit requests for renewed negotiations. Lacking any suggestion of dates or even timeframes for the resumption of bargaining, those statements communicated only the Union's receptivity to the idea of further bargaining—a receptivity that was reciprocated by Iltis on both occasions. Of course, Iltis could have advanced the process by suggesting dates herself, but so could Pearson. We decline to find that the Respondent had any greater duty in this regard than did the Union.

Pearson's admission that the parties understood that meetings were to be called (if at all) through the mediator is also significant because it belies any suggestion that the Respondent unilaterally imposed such a requirement as a procedural obstacle to negotiations. In addition, Pearson's testimony leads us to reject the judge's finding that the Respondent's reliance on that understanding was suspect because it was not articulated until late January 1989, instead of contemporaneously with the Union's November 1988 requests for further bargaining. On the contrary, if the parties understood that meetings would be set up by the mediator, as Pearson testified, it is not surprising that Iltis did not mention that understanding to Pearson in November, since Pearson clearly was as well aware of it as Iltis was. A more appropriate inference is that the Respondent, pursuant to the parties' understanding, assumed that the Union would contact the mediator concerning further meetings, and that the Respondent would hear from the mediator concerning dates and times for future bargaining sessions. When Pearson sought to resume negotiations directly in January 1989, Iltis simply reminded him that meetings were supposed to be scheduled through the mediator. Given Pearson's admission that the Respondent and its representatives never refused to meet with the Union, we are unable to find, on this record, that the delay in resuming negotiations was the result of unlawful conduct on the part of the Respondent.[10] We shall, therefore, dismiss this allegation of the complaint.

ORDER

The National Labor Relations Board orders that the Respondent, J. W. Rex Company, Lansdale, Pennsyl-

[9] Pearson testified as follows:

Q. Now, did you–you testified previously that once Mr. Kapner took over the negotiations he was the one who called the meetings, is that correct?

A. Yes, the meetings *had to be called through him, yes*. [Emphasis added.]

[10] Cf. *Standard Rice Co.*, 46 NLRB 49, 53–54 (1942) (no 8(a)(5) violation where parties failed to meet because of mutual misunderstanding concerning which party was to contact the other about resuming negotiations).

vania, its officers, agents, successors, and assigns, shall take the actions set forth in the Order as modified.

1. Delete paragraph 1(d) and reletter the subsequent paragraphs.

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate you about activity protected by the Act, in a manner constituting interference, restraint, and coercion.

WE WILL NOT discourage membership in the Union (United Steelworkers of America, AFL–CIO–CLC, and its Local No. 5621) by delaying the reinstatement of strikers who have unconditionally offered to return, or by otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment.

WE WILL NOT fail or refuse to bargain in good faith with the Union with respect to the unit referred to in article I of our contract with the Union effective between September 15, 1985, and September 17, 1988.

WE WILL NOT, without the existence of a legally cognizable impasse, make unilateral changes with respect to minimum wage rates, the number of labor grades, job classifications and job descriptions, job evaluation policy, wage rates of group leaders, sales bonus plan, wage-hour guarantees, overtime policy, training period rate progression, temporary transfer policy, recall, layoff, and bumping policies, policy regarding the recall of striking employees, seniority policy, vacation replacement policy, holiday pay and vacation policy, merit increase policy, payment of pro rata vacation pay to employees who quit, job classification required to empty trash cans, the practice in connection with the performance of unit work by supervisors, or any other mandatory subjects of collective bargaining, within the previously described bargaining unit.

WE WILL NOT make unilateral changes with respect to the assignment of unit work to persons not on our payroll, or any other mandatory subjects of collective bargaining, within the previously described bargaining unit, without giving the Union prior notice and an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under the Act.

WE WILL make the following employees whole, with interest, for any loss of pay they may have suffered by reason of the discrimination against them:

Ann Antonacio	Arland Landis
Joel Audain	Alfred Leotta
Charles Ball	Victor Lopez
Joe Bennett	Willie Lott
Jose Carreras	Thomas Mastromatto
Alan Clarke	David Michie
Terry Copenhauer	John Novotny
George Cute	William Ordille
Mary Denton	Damascene Pierre
Anthony Famularo	Robert Reynolds
Thomas Felder	Marcelo Rivera
Tod Frederick	John Roeder
David Gerhart	Rogelio Rosa
Carson Heil	Harold Samuelson
Brian Hendricks	Gary Schoch
Lucien Hendricks	Albert Smith
Robert Hinkle	Esau J. Smith
John Hodum	William Stotsenburgh, III
J. Paul Homan	Jose Vallejo
Gary Kaminski	Eugene Waldspurger
Raymond Kreuson	Charles Zeigler

WE WILL, on request by the Union:

(1) Rescind the minimum wage rates and merit increase policy established about November 29, 1988.

(2) Restore the labor grades in existence until about November 29, 1988.

(3) Rescind the changes made about November 29, 1988, in (a) job classifications and job descriptions; (b) the job evaluation policy; (c) wage rates for group leaders; (d) wage-hour guarantees; (e) overtime policy; (f) the training period rate progression; (g) temporary transfer policy; (h) recall, layoff, and bumping policy; (i) seniority policy; (j) vacation replacement policy; and (k) holiday pay and vacation policy.

(4) Abolish the sales bonus plan.

(5) Rescind the policy instituted about November 29, 1988, regarding the recall of striking employees.

(6) Resume the practice of paying pro rata vacation pay to employees who quit.

(7) Rescind the requirement that bargaining-unit production employees empty their trash cans.

(8) Rescind the changes made, after the expiration of the bargaining agreement on September 17, 1988, in the practice in connection with the performance of unit work by supervisors.

(9) Abandon the practice of permitting the unit work of loading and unloading trucks to be performed by truckdrivers not employed by us.

However, nothing in the Board's Order is to be construed as requiring us to cancel any wage or other financial improvements without a request from the Union.

WE WILL make employees whole, with interest, for any loss of pay they may have suffered by reason of our unlawful unilateral actions. As to our unilateral abandonment of our prior practice of paying pro rata vacation pay to employees who quit, such payments will be made to Ann Antonacio, Edward Camburn, John Fillman, and Kenneth Smith, and any other employees who failed to receive pro rata vacation pay upon their resignation.

WE WILL, on request, bargain in good faith with the Union as the exclusive representative of the employees in the above-described unit with respect to rates of pay, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

J. W. REX COMPANY

William E. Slack Jr., Esq. and *Monica McGhie-Lee, Esq.*, for the General Counsel.

Edward H. Feege, Esq. and *Thomas G. Servodidio, Esq.*, both of Bethlehem, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. This case was heard before me in Philadelphia, Pennsylvania, on August 16–18 and September 20–22, 1989, pursuant to a charge filed on December 12, 1988, against Respondent J. W. Rex Company by United Steelworkers of America, AFL–CIO–CLC (the International) on December 12, 1988, and a complaint issued on March 29, 1989, and amended on August 16, 1989. The complaint as amended alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by interrogating employees regarding their decision to abandon a strike and to return to work; violated Section 8(a)(1) and (3) of the Act by delaying the reinstatement of 42 named strikers; and violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain in good faith,[1] by changing terms and conditions of employment without giving the employees' collective-bargaining representative an opportunity to bargain and (as to some such changes) without giving the representative prior notice, and by failing and refusing to meet and negotiate with the employees' bargaining representative over the terms of a new collective-bargaining agreement.

On the basis of the record as a whole, including the demeanor of the witnesses, and after consideration of the briefs and reply briefs filed by counsel for the General Counsel (the General Counsel) and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Pennsylvania corporation with a facility in Lansdale, Pennsylvania, where Respondent is engaged in the business of heat-treating metal parts. During the year preceding the issuance of the complaint, Respondent, in the course of such business operations, sold and shipped goods and materials valued in excess of $50,000 annually directly to points located outside Pennsylvania. I find that Respondent is engaged in commerce within the meaning of the Act, and that assertion of jurisdiction over its operations will effectuate the policies of the Act. *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224 (1963); *Siemons Mailing Service*, 122 NLRB 81, 85 (1958).

Local Union No. 5621, United Steelworkers of America, AFL–CIO–CLC (the Local) and the International are each labor organizations within the meaning of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

1. Respondent's preparations for the 1988 negotiations

Since 1959, the Local and the International (sometimes jointly called the Union), have been recognized by Respondent as the exclusive representative of an admittedly appropriate unit which consists essentially of Respondent's production and maintenance employees and drivers, and which is specifically described in Conclusion of Law 3, infra.[2] Respondent and the Union have been parties to a series of collective-bargaining agreements, the most recent of which became effective on September 15, 1985, and expired by its terms on September 17, 1988. Until that agreement expired, the unit employees had conducted a total of one strike, in 1961.

Respondent operates a job shop which performs work pursuant to individual orders from customers. Between 1985 and 1987, Respondent's sales declined by 35 percent. Profits also declined, with 1987 showing a loss. John W. Rex, who is the president and a director of Respondent and is also a shareholder and a director of the corporation which owns all of Respondent's stock, testimonially attributed this deterioration to competitors (both union and nonunion) which were able to fill orders faster than Respondent and whose labor costs

[1] The complaint alleges that Respondent bargained in bad faith from about August 18 to about November 14, 1988. However, counsel for the General Counsel averred in his opening statement, and contends in his opening brief, that such alleged unlawful conduct began on November 7, 1988.

[2] My finding that the bargaining representative consisted of both the Local and the International is based on the pleadings and on the signature page of the most recent bargaining agreement. The parties stipulated that the bargaining representative is the Local. Any issue thus presented has no relevance to the merits of the instant case.

(Respondent's principal costs, other than energy costs) were lower than Respondent's.

Rex testified that shortly before the August 1988 commencement of negotiations for a new bargaining agreement to replace the 1985–1988 agreement, he had decided that he was going either to liquidate the business, to find a way to scale it down and provide only the services which were profitable, or to try to deal with the issues of turnaround and labor costs. During conferences with Labor Relations Consultant Robert J. Hoelscher and Personnel Director Linda C. Iltis in preparation for negotiations,[3] Rex described these concerns; Hoelscher testified that Rex expressed a preference for the third option because he felt that he had an obligation to his long-service employees. Rex asked Hoelscher to work with Iltis and Respondent's other managers to develop proposals that would achieve the goals of improving operational efficiency and reducing labor costs.

Further, Rex told Hoelscher to ''get'' into the arbitration section the provision, called the ''loser-pays-all'' clause, ''Compensation and expenses incident to the services of the impartial arbitrator shall be paid by the losing party.'' Both the 1985–1988 agreement and its predecessor provided that ''expenses and fees shall be paid equally by the parties.'' A loser-pays-all clause had been proposed by Respondent during the 1985–1988 negotiations. However, Respondent had dropped this proposal after receiving assurances from International Representative Kenneth Schultz, who at that time was handling grievances on the Union's behalf, that thereafter he did not intend to take to arbitration employee grievances of very little substance.[4] As to Rex's reasons for wanting this loser-pays-all provision, he testified on direct examination that he felt such a provision would tend to encourage union leadership to exercise what Rex perceived as their responsibility to reject the membership's request for arbitration of plainly unmeritorious grievances. He further testified on direct examination that his instructions to Respondent's negotiators ''had to do with the extensive number of grievances and arbitrations that we had been having over the years . . . I think we had more arbitrations in the last six years than we had in the [whole] preceding of the company . . . . Until '58 when the original United Steelworkers organized the company [cf. supra, fn. 2] . . . . There was a lot of unrest and upset about each of these issues and even when the grievance was dropped, there was still a whole lot of time that was spent not just by the committee and the people dealing with it on an official basis, but the people in the shop, too.'' At this point in his direct examination, the following exchange took place:

> Q. Philosophically you don't have any objection to a grievance and arbitration procedure in the contract do you?
>
> A. No, of course not.
>
> Q. What was your problem then?
>
> A. My problem was cost. The fact that we spent so much time dealing with these issues. It seemed to me we [were] spending more time dealing with these issues than we were doing in performing the services for which we get paid that is heat treating. That is an exaggeration, but it was that concerning to me.

When asked what Rex said, during prenegotiation meetings with Iltis and Hoelscher, about the cost of arbitration, Hoelscher testified at one point, ''I don't know that Mr. Rex talked about the cost of arbitration. He said that the costs and the inefficiencies caused by all of these frivolous arbitration cases and he wanted this contract to contain what he wanted the last time.'' Hoelscher further testified, ''I don't know that [Rex] ever really talked about the amount of time spent on grievances as much as the arbitration developing it and the cost associated with that which was said at times, but I don't particularly remember it being said that summer [1988].''[5]

2. The initial bargaining session

During the bargaining negotiations, the Union was represented by International Representative Pearson and a 5-employee negotiating committee which until November 7, 1988, included the Local's president, vice president, and recording

[3] Although Respondent's answer admits that Iltis was its agent, as to Hoelscher such status is denied. Because Hoelscher's status is material solely for the purposes of determining whether Respondent is answerable for his conduct in connection with negotiations, for purposes of this case I believe to be sufficient the Respondent's admission that he was its ''chief negotiator,'' Company President Rex's testimony that Hoelscher ''led the negotiations, and Iltis' testimony that Hoelscher was Respondent's ''chief spokesman.'' See *Hyatt Regency New Orleans*, 281 NLRB 279, 282 (1986); *Jet Spray Corp.*, 271 NLRB 127, 133 (1984). In any event, admitted agent Iltis, who was present throughout negotiations, ratified Hoelscher's conduct by failing to disavow it. See *San Luis Obispo County Restaurant Assn.*, 196 NLRB 1082, 1084 fn. 7 (1972).

[4] An exhibit offered by Respondent shows, as to the period between 1982 and 1988, how many cases were withdrawn after being taken to arbitration (13), how many were settled after the arbitration hearing but before the decision issued (1), and the results of the 25 arbitrator's awards actually issued—20 for Respondent, 4 for the Union, and 1 ''split decision.'' An undisclosed number of the withdrawals involved cases which were controlled by the disposition of other cases in fact decided by the arbitrator. However, the exhibit contains no breakdown by years. Hoelscher, who handled all of Respondent's arbitration cases during this period, testified that during the 12 months after negotiations commenced in 1982, more grievances were taken to arbitration than in any subsequent year (and some were withdrawn). In May 1987, when Henry Pearson replaced Schultz as the Union's grievance processor, four arbitration cases were pending, of which Pearson withdrew one which was close to hearing. Thereafter, Pearson submitted three more grievances to arbitration, of which he withdrew one. Two grievances went to arbitration after Pearson took over; Respondent prevailed in both of them, and Hoelscher testified to the opinion that neither should have been taken to arbitration. The record fails to show whether it was Schultz or Pearson who requested arbitration in these two cases. Iltis testified that after Pearson became involved, fewer frivolous grievances were filed. However, both she and (in effect) Hoelscher testified that some grievances which they considered frivolous had been unsuccessfully taken by Pearson to arbitration; and Hoelscher testified without contradiction to a statement by Pearson that he had taken some of these cases solely because his superiors had told him to comply with the wishes of the employee grievance committee.

[5] Hoelscher then testified that at some point in time, Rex said that he was upset about the ''indirect costs'' because of the disruption of the manufacturing process when preparations were made for an arbitration hearing on a grievance which was dropped at the last minute. Iltis credibly testified that most of the time which she herself spent in connection with grievances was spent preparing them for arbitration, and that most of the dropped grievances were dropped so close to the scheduled arbitration date that Respondent had already completed its preparation.

secretary. Respondent was represented by Hoelscher and Iltis.

At the initial bargaining session, on August 18, 1988, Pearson gave Respondent a document, in the form of proposed changes in the 1985–1988 agreement, which set forth the Union's proposals with respect to a succeeding agreement. At Hoelscher's request, Pearson read these proposed changes aloud and explained the perceived problem each such proposed change was intended to address. The content of some of these proposed changes is discussed infra.

Then, Hoelscher gave an opening statement to the effect that Respondent wanted the freedom to run the plant efficiently and profitably, without losing any jobs. Hoelscher said that no wage increase should been given in 1985; and that since then Respondent's hourly employment had diminished by almost 50 percent, its salaried employment had diminished by 33 percent, and its sales had diminished by 49 percent. Hoelscher said that ''jobs were being threatened unless we did something about it to turn this tide.'' He said that the average hourly rate in the plant was $10.20, the indirect hourly costs were ''even worse'' and ran about $7.17, and ''we just had to address these problems.'' Hoelscher further said that low-skilled employees were being paid very well for a low-skilled job. Then, Hoelscher gave the Union a document, in the form of proposed changes in the 1985–1988 agreement, which set forth Respondent's proposals with respect to a succeeding agreement. Hoelscher read these proposals, numbered 1 through 22, aloud to the Union. During this process, Pearson made at least some comments. When Hoelscher reached proposal 18, the loser-pays-all proposal (referred to in subsequent documents as ''C-17''), Pearson said, ''I just want you to understand I haven't said no to anything so far, but that one we are saying no to.'' This was the only company proposal Pearson did say no to.

3. Bargaining sessions between August 26 and October 4, 1988, inclusive

a. *Overview of the status of negotiations as of the end of the October 4 session*

The parties conducted additional bargaining sessions on August 26 and 30, September 1, 12, 13, 15, and 16, and October 3 and 4, 1988. As of the end of the October 4 session, the Union had abandoned its initial, August 18 proposals with respect to visitation rights of union representative, notice to Union of subcontracting, management rights, temporary transfer of employees from day shift for purposes of training new employees, pay for employees temporarily transferred to higher paying jobs, time limits for filling posted jobs, amount of compulsory overtime, advance notice to Union of overtime, advance notice of requirement that active employees fill in for vacationing employees, modification of requirement that employees work immediately before and immediately after a holiday in order to be paid for the holiday, increase in length of paid funeral leave and paid jury duty leave, increase in length of vacations, increase in shift premiums and in life, accidental death, and dismemberment insurance, a change in health insurance plans, decrease in length of employment to qualify for insurance, increase in life insurance for pensioners, increase in company payment into the pension plan, company payment for safety shoes, paid sick days, a provision forbidding disciplinary suspension until after a decision in any grievance case challenging the suspension, and a limitation on intershift transfers. Also as of the end of the negotiations on October 4, the Union had agreed to Respondent's proposals as to overtime to employees who had been out on a longterm illness, holiday pay for employees out on workmen's compensation, time limits on scheduling of grievance meetings, pay for grievance-committee members for time spent during grievance meetings, a regular schedule for grievance meetings, only one grievance to be arbitrated at a time, cancellation of insurance for strikers, elimination of maternity benefits, and vacation pay for retirees. Also as of the end of negotiations on October 4, Respondent had agreed to the Union's proposals as to posting of temporary transfers, notification of employees regarding vacation schedules, and inclusion of time spent pursuant to subpoena as time worked for overtime and disciplinary purposes. Still as of the end of negotiations on October 4, Respondent had dropped its initial proposals as to the time permitted employees to decide whether to ''bump'' or be laid off, retention of prior wage rate by employee who elected to ''bump,'' loss of seniority for employees out on workmen's compensation, deletion of double time for work in excess of 11 hours a day, and elimination of definition of recognized holiday.

As of the beginning of the bargaining session on October 4, the parties remained in dispute as to matters discussed, infra, part II,A,3,d, and e.

b. *Events at the meetings through September 16*

The 10 meetings held on or before October 4 consumed about 50 hours, including caucuses and lunchbreaks.[6] As previously noted, at the first meeting, which consumed about 2-3/4 hours, Pearson told Respondent that he was saying ''no'' to Respondent's loser-pays-all proposal. At the second meeting, on August 26, which consumed about 6 hours including a caucus and a lunchbreak, Pearson stated that as to this proposal his answer was, ''No. We lose too many.'' At most, this proposal was merely mentioned at the third meeting, on August 30, which consumed about 5-1/4 hours including a caucus and a lunchbreak.[7] At the fourth meeting, on September 1, which consumed 4-1/2 hours including a lunchbreak, the parties went through the remaining unresolved issues. When they reached the loser-pays-all proposal, Hoelscher told the union representatives that this was an ''important'' proposal and that Respondent was ''serious'' about it. Respondent said that too many cases were being taken to arbitration and then dropped, and Respondent really felt they were frivolous. Respondent further said that arbitration was very expensive, time-consuming, and disruptive. Pearson said that the decision to go to arbitration was made by him and not the ''Committee''; that his answer to the loser-pays-all proposal was still no, but that this proposal was still open for consideration.

[6] This finding is based on Iltis' bargaining notes, received into evidence without objection or limitation. The figure assumes that the September 15 meeting and the October meetings began at 10 a.m., the hour when most of the other meetings began.

[7] This finding is based on Iltis' notes, which as to this proposal contain only the entry ''Open.'' For demeanor reasons, I do not accept Hoelscher's generalized testimony that ''there were long discussions every time [the loser-pays-all] proposal came up.''

The next meeting, on September 12, consumed more than 4 hours. During this meeting, the Union again said no to Respondent's loser-pays-all proposal.[8] The next meeting, on September 13, consumed about 5 hours. During this meeting, Pearson said that he no longer gambled about taking grievances to arbitration; Respondent said that bad cases had previously been taken to arbitration; Pearson said that the present grievance committee was different; and Respondent said that loser-pays-all was on the table because arbitration is costly and Pearson ''can say he wasn't party to it.'' For the first time during negotiations, a representative of the Federal Mediation and Conciliation Service, Alex Kapner, was present. The meetings on September 15 and 16, which each consumed about 6 hours, were also attended by Kapner. Pearson's entries for these two meetings on a photocopied status sheet given him by Hoelscher contain ''No/no'' after the loser-pays-all proposal. Because Iltis' notes contain nothing about the matter, I conclude that it was discussed only briefly (see supra, fn. 7).

When the September 16 meeting broke up, Pearson commented that the negotiations had been handled very professionally and he particularly enjoyed using the worksheets prepared by Hoelscher. Moreover, one employee member of the bargaining committee stated that he had found the negotiations to be enjoyable and educational, and another member commented that he hoped ''we had all learned more communication.''

c. *The membership's rejection of Respondent's ''final offer'' of September 16; the strike*

The Union's internal procedures require its negotiators to submit to the membership any proposed contract which the employer has described as its final offer. During the September 16 bargaining session, Respondent told the Union, ''this is our last, final offer . . . there is no more.'' On September 17, Pearson submitted Respondent's September 16 proposal, including the loser-pays-all proposal, to the membership, without any recommendation from him or the committee one way or the other. The membership overwhelmingly rejected the proposal, for reasons not shown in the record. Pearson relayed to the membership Respondent's statement, at the September 16 meeting, that Respondent was willing to let the employees continue to work while negotiations continued, provided Respondent received 2 hours' notice of any strike. The employees voted against continuing to work. On September 17, 1988, all of the about 60 employees in the bargaining unit went out on what the parties agree was a protected economic strike.

d. *The October 3 and 4 meetings*

The next meeting, called by FMCS Representative Kapner, was held on October 3, and lasted about 5-/1/2 hours. The parties' presentation to Kapner about their respective positions made it clear that the loser-pays-all proposal was still on the table, but at the meeting there was little comment about it.[9]

The next bargaining session was held on October 4, 1988, and was also attended by FMCS Representative Kapner. Initially, the parties discussed a union suggestion to look into a multiemployer pension plan, which Respondent said was ''really not feasible . . . at this point.'' Then, Respondent orally described its still-pending September 16 proposals with respect to wages, seniority, accident and sickness insurance, pay for employees who participated in grievance meetings, funeral leave, and the loser-pays-all proposal. As to this last proposal, Pearson said no. After what Iltis testimonially described as a ''lengthy discussion'' of Respondent's seniority proposal and then a union caucus, the Union agreed to accept Respondent's proposals as to seniority, pay for grievance meetings, funeral leave, and (the parties believed) wages.[10] In addition, the parties reached agreement as to accident and sickness insurance. Respondent rejected the Union's proposal, which was still on the table, permitting employees to ''bid down'' on vacancies, but, after caucusing, agreed to the Union's proposal regarding notification of rule changes.

At this point, the Union asked Respondent to provide in writing, for the parties' signature, the tentative agreements on seniority, funeral leave, and accident and sickness insurance. Respondent's negotiators said that they would have to go to to Respondent's office for this purpose, and would return in about 20 minutes. The time was then 11:40 a.m., and the parties had been meeting for about an hour.

An hour or an hour and a half later, Kapner telephoned Hoelscher and urgently asked, in effect, why he and Iltis had not returned. Kapner said that the union representatives were ''anxious. They are sitting here.'' Hoelscher told Kapner to tell the union representatives to go out to lunch, and that he and Iltis would work through the lunch period and would be ''right back.'' Hoelscher testified, in effect, that before returning to the negotiating table that afternoon, he and Iltis told Rex that the parties had come to an agreement.

At 2:15 p.m., Respondent's negotiators returned with 13 sets of papers calling for the parties' signatures. Each set of papers included language covering a different bargaining subject. These ''sign-off'' sheets included the tentative agreements (with respect to seniority, funeral leave, and accident and sickness insurance) which the Union had asked Respondent to reduce to writing; the parties' tentative agreement that day regarding notice to the grievance committee of any new rules and regulations; calendars indicating the paid holidays for each of the 3 years contemplated by the parties as the effective period of the contract; two memoranda of understanding with respect to rotation within a classification and payment of accrued vacation; and a document which included an arbitration provision with Respondent's loser-pays-all proposal underscored. Iltis testified that as to certain subjects, she and Hoelscher had prepared ''sign-off sheets'' not requested by the Union because, upon conferring at Respond-

[8] This finding is based on Pearson's testimony and on Iltis' notes, which as to this issue contain only the notation ''No'' for that day. See supra, fn. 7.

[9] My findings in this sentence are based on Iltis' notes and testimony. Hoelscher testified on cross-examination that he did not remember a specific conversation with Kapner away from the bargaining table on this occasion. Accordingly, I do not credit Hoelscher's testimony (uncorroborated by Iltis) on direct examination that on that day, Kapner highlighted the loser pays all issue by asking Hoelscher and Iltis away from the bargaining table whether Respondent was ''really firm'' on that issue.

[10] The Union believed that the proposal accepted by it included continuation of a vacation bonus of 7 cents an hour; Respondent intended this proposal to exclude the bonus.

ent's office, ''we realized that there were several issues that we . . . did not really have language written on and needed to write it.'' Hoelscher testified to the belief that when he and Iltis drafted the sign-off sheets, they set forth agreements which the parties had in fact reached.

Respondent gave Pearson several copies of each of the sign-off sheets in the order in which their subjects appeared in the expired contract. As to the first few sheets, which had been requested by the Union, he glanced at each and then laid them aside.[11] Then, Respondent gave him copies of the sheet which contained the arbitration provision, with Respondent's proposed loser-pays-all language underlined. Pearson, who had twice rejected this proposal earlier that day and before Hoelscher and Iltis had repaired to the plant to draft the sign-off sheets, said, ''No, I am not accepting this.'' Hoelscher said that as to this matter, Respondent's proposal was the same that it had always been. Raising his voice and engaging in actions which at least suggested he was about to leave, Pearson said, ''I told you that I am not going to accept it . . . let's go fellows,'' and accused Respondent of bargaining in bad faith. Hoelscher denied this, whereupon Pearson said, ''I read off to you what we would accept. I said no to the arbitration expenses. It will be no. Everything else is OK.'' Hoelscher said that Pearson should calm down and go through the rest of the sign-off sheets to see whether there was anything else that the Union was not going to agree to. Then, Hoelscher gave the Union the rest of the sign-off sheets, the two proposed memoranda of understanding, and the sets of calendars which showed the paid holidays for the 3-year period which (the parties anticipated) would be covered by the contract under negotiation.

After some discussion of the sign-off sheets with respect to seniority and funeral leave, Pearson said that the Union could not go with the loser-pays-all proposal. Employee William C. Stotsenburgh III, a member of the employee negotiating committee, said that Respondent was now dealing with a different grievance committee. Respondent replied, ''Maybe we'll have the old committee back in three years.'' Pearson stated that it was he who decided which cases went to arbitration, and ''If it has no merit, I don't take it.'' Stotsenburgh stated that he had no intention of wasting time on frivolous grievances. At this point, the parties caucused in order to give the Union an opportunity to go over the sign-off sheets, and related material, presented by Respondent.

When Hoelscher and Iltis went out into the hall, they were joined by Kapner, who asked if Respondent was serious about the loser-pays-all proposal. They replied that Respondent ''certainly was'' serious.[12] Iltis then left the others in order to telephone Rex about the status of the negotiations. Hoelscher testified, without contradiction or corroboration, that after Iltis left to telephone Rex:

> I said [to Kapner] there is no sense my calling Mr. Rex because I know his opinion [about ''loser-pays-all'']. I talked to him about it this morning. I talked to him about it yesterday and it is firm. [Kapner] said you know this really is an International problem for [Pearson; see infra, part II,A,3,f] and I said I understand that.

Hoelscher further testified that during the early part of the negotiations he understood that to agree to loser-pays-all Pearson would first have to get someone else to agree; but that by the time of the October 4 conversation with Kapner, Hoelscher had concluded that the employee committee or Pearson's superiors had told him he had to ''stand firm on loser-pays-all.''

Rex testified that when Hoelscher and Iltis had returned to the office earlier that day to prepare the sign-off sheets, Rex was under the impression that Respondent and the Union had come to an agreement. In Iltis' telephone conversation with him during the caucus break, she stated that there was no agreement, that some issues were still outstanding, that the primary issue was loser-pays-all, and that there were a ''couple of small issues.''[13]

Iltis testified to telling him that ''what was holding up the agreement was this loser pays all issue'' and to asking him whether he was still firm about maintaining this proposal. She further testified that he said yes, because ''he felt that this was the only way to discourage the frivolous grievances going to arbitration.'' Because the foregoing testimony by Iltis was not corroborated by Rex, and for demeanor reasons, I do not credit such testimony by her. Iltis further testified that upon her return to Hoelscher and Kapner, who were still standing in the hall, Kapner asked why Respondent was ''so adamant'' on the loser-pays-all issue; that she said the arbitration cases were ''just too time-consuming and disruptive and expensive;'' and that Kapner said Pearson had told him this was an International issue and Pearson did not have the authority to agree to Respondent's proposal. On timely objection, Iltis' testimony was not received to show the truth of Kapner's alleged representations to Iltis and Hoelscher. Because Hoelscher did not corroborate her testimony about this alleged conversation between them and Kapner, because any such representations by Pearson to Federal Mediator Kapner would have been inaccurate (see infra, part II,A,3,f), and for demeanor reasons, I do not believe her testimony that Kapner made such representations.

After the Union returned from its caucus, both parties initialed all the holiday calendars presented by Respondent; signed the sign-off sheets with respect to notice of rules and regulations, seniority, and insurance; and signed the memoranda of understanding regarding accrued vacation for separated employees and rotation of heat treaters. The Union refused to sign the funeral leave sign-off sheet, on the ground that the Union had understood the agreement to call for 4 days' leave as to stepchildren whereas the sign-off sheet specified 3; Respondent undertook to consult its notes regarding this matter.[14] In addition, the Union refused to sign

[11] The testimony of Hoelscher and Iltis indicates that ordinarily, Pearson would hand out copies of prepared sign-off sheets to his committee, who would put them aside until they could be discussed amongs themselves.

[12] This finding is based on Iltis' testimony. For demeanor reasons, I do not accept Hoelscher's uncorroborated testimony that he replied, ''Mr. Rex feels every bit as strongly as the Union obviously does.''

[13] My findings in this sentence are based primarily on Rex's testimony. He did not recall what the ''small issues'' were, and she did not testify to mentioning any issues other than loser-pays-all.

[14] This finding is based on Hoelscher's and Iltis' testimony and her notes. Because the unsigned sign-off sheet calls for funeral leave with respect to both stepchildren and stepparents, I believe Pearson was mistaken in testifying that as of the end of the October 4 meeting, the inclusion of one of these classes of relatives was still an

the sign-off sheet regarding loser-pays-all. Nor did the parties sign the sign-off sheet as to checkoff; Hoelscher testified that ''we didn't sign that off because [Pearson] said hey we are going to work it out, but I . . . don't want to sign something until we both agree and I accepted that from [Pearson] that that wasn't a problem that we could resolve that'' (see infra, part II,A,2,e).

Hoelscher testified that after the October 4 meeting broke up, he and Iltis told Rex that the parties had not come to an agreement. Hoelscher further testified to the opinion that as of that date, he believed the parties to be ''hopelessly deadlocked'' because of the loser-pays-all issue.

e. *Negotiations regarding the checkoff clause*

Among the sign-off sheets which were not executed on October 4 was a company proposal with respect to the checkoff clause. Included in the agreement which expired in September 1988 was a checkoff clause which stated, inter alia, ''The Company shall promptly remit any and all amounts so deducted to the International treasurer of the Union, who shall notify the Company in writing of the respective amounts of the dues and initiation fees which shall be so deducted.'' When the parties began the 1988 negotiations in August, neither party proposed any changes in the checkoff clause. At that time, Respondent was computing the amount due, which consisted of double the average hourly rate.

On an undisclosed date in 1987 or in 1988 before September, the International made in its dues structure certain changes (effective February 1, 1989) which Pearson was testimonially unable to explain in full, and which made more difficult the calculation of how much each employee owed. The new dues structure required at least two, and perhaps three, calculations for every employee. A letter (inferentially from the International) which set forth the new dues structure, and examples of the new calculations, were given to Respondent by Pearson during the bargaining session on September 12, 1988. The computers used by Respondent in connection with payroll deductions were incapable of performing the calculations required to determine the amounts to be deducted under the new dues structure. Probably on September 16, and certainly before October 4, Respondent submitted to the Union a proposal to change the old checkoff language by substituting the word ''specific'' for the word ''respective.'' Pearson testified that on October 4 this proposal was unacceptable to the Union because (he believed) Respondent was proposing that the amounts to be deducted would be determined by ''our financial officers,'' and ''they were not capable of doing that.'' A sign-off sheet prepared by Respondent on October 4 stated, ''The method of deducting Union Dues beginning February 1989 will be mutually agreed upon by the parties.'' Although Iltis testified that on October 4 the Union agreed to this company proposal, it was not signed by the parties on that day; as previously noted, Hoelscher testified that Pearson said the parties were going to work it out but he did not want to sign something until they agreed. Pearson testified that as of October 4, 1988, it was ''probably'' difficult to try to work out something that could satisfy both parties on the checkoff issue. Hoelscher testified that the issue ''was a mechanical one. I don't think Mr. Pearson or I ever thought that either of us would take a strike on that issue. It just was something that neither of us knew how to resolve, but we always felt that we could in fact resolve that. Some way we would make adjustments until there could be a way.'' Hoelscher further testified that on a date he was not asked to give, the parties agreed that Respondent's ''computer guy'' would call up someone in an appropriate union staff position to try to work out a method for making the deduction.

f. *Pearson's instructions from the International about the loser-pays-all and checkoff clauses*

Pearson testified that when he told Respondent that his refusal to agree to the loser-pays-all clause was a matter of International policy, he based this statement ''on the fact of all the contracts I had over the years [he has been an International staff representative since 1979], we never had one where loser pays in arbitration.'' He further testified as follows:

> Q. Henry, during the fall of 1988 did you receive any specific instructions from John Reck or John Vogel[15] about what you could or couldn't agree to in the Rex negotiations?
>
> A. No, I didn't receive any special instructions of what I could or could not agree to, but there were certain things that I shouldn't agree to if I could get around it.
>
> . . . .
>
> There were certain things that—well, a couple of things that probably I shouldn't agree to if I could get around negotiating the contract without.
>
> Q. Okay, and who told you that?
>
> A. John Reck.
>
> Q. Okay. And what did he tell you to try to avoid agreeing to?
>
> A. Loser paying arbitration is one. The dues structure. That is about all.[16]

open issue. Hoelscher credibly testified that the sign-off sheet conformed to his worksheets.

[15] International District Director Reck is Pearson's immediate superior. Pearson also reports, ''in a sense,'' to Vogel, who is the assistant to the district director.

[16] The quoted material is from the transcript pages cited by Respondent in support of its assertions, in its opening brief (p. 38, emphasis in original):

> *In fact, Mr. Pearson testified that his superiors specifically instructed him, before the 1988 negotiations commenced* [in August 1988], *that he should NOT agree to the ''loser pays all provision.''*
>
> Similarly, the Union sought the Company's agreement on a new method to calculate and deduct union dues from the employees' paychecks. *Mr. Pearson was specifically instructed by his superiors to obtain this concession from the Company.*

Respondent's reply brief (p. 12) also cites these transcript pages, inter alia, in support of its assertion (emphasis in original):

> Mr. Pearson testified that prior to the onset of the negotiation sessions, he received specific instructions from his superiors [that] the Union should *not* agree to a ''loser pays all'' proposal.

At the hearing, Respondent's counsel stated that he had not argued, and did not intend to argue, that the loser-pays-all issue could not have been resolved because Pearson's superiors would never have agreed to such a clause. Respondent's counsel further stated that he did not intend to argue that the Union in fact had an International

Continued

Hoelscher testified that when Kapner told him that loser-pays-all was an ''International problem'' for Pearson, Hoelscher understood that Pearson ''on his own hook could not make a decision to go along with it.'' Iltis testified that by ''an International issue,'' she understood that Pearson ''did not, by himself, have the authority to agree to that proposal.'' Pearson testified that whether or not he would have agreed to such a proposal ''depends on how the negotiations would have went.''

As previously noted, Pearson submitted to the membership, who rejected it, Respondent's September 17 proposal, which included Respondent's loser-pays-all proposal and, probably, Respondent's checkoff proposal as well. Before this vote was taken, Pearson told the membership what Respondent wanted, including the loser-pays-all clause, and what the benefits were. As described infra, part II,E, Pearson later submitted to the membership, who rejected it, Respondent's November 7 proposal, which included both clauses. Pearson made these submissions, in both cases without recommendation one way or the other, because Respondent had characterized them as final offers and International policy requires submission of such offers to the membership. Pearson testified that if approved by the membership, either of such proposals would have become a binding contract. Iltis testified to a belief that this would have been the result of membership approval.

B. *The Preparation of Respondent's Contract Proposal of November 7, 1988*

As previously noted, all of Respondent's approximately 60 unit employees struck on September 16, 1988. The Union did not request reinstatement of the strikers until November 16, 1988 (see infra, part II,F). Respondent continued to operate the plant during this entire period, and while recalling strikers on various effective dates on and after November 29, 1988. Until about November 15, when Respondent hired 2 permanent replacements, Respondent was operating the plant 24 hours a day and 5 days a week, with about 22 management, administrative, and clerical personnel, all of whom worked at least 12 hours a day, and with 10 or 12 temporary employees, some of whom worked shifts shorter than 12 hours. Using this work force, Respondent found itself able to meet customer deliveries and to equal or better prestrike output, although, according to Rex, ''most of us could hardly stand up during that period of time.'' During this period, any individual could be assigned to perform any job required.

During a series of meetings with Iltis and Hoelscher after October 4, 1988, Rex attributed Respondent's prestrike problems principally to the work rules and other restrictions contained in the expired collective-bargaining agreement. He instructed Hoelscher and Iltis to redraft Respondent's proposals in a way which would allow the plant to be operated with the sort of increased flexibility which was being exercised during the strike, and with an incentive, comparable to that shared by the personnel who worked during the strike, to generate sales for Respondent. During these discussions, Rex said that 22 people were working at the plant, with no grievances, and Respondent was able in general to meet its delivery commitments.[17] When asked on redirect examination about such comments, Rex testified that he had no difficulties with employees' right to grieve problems, that successful companies (whether union or nonunion) had to afford employees the ability to express dissatisfaction or concern, and that ''What I get upset about are the frivolous grievances. The ones that happen over and over again, with the same issues.''

About mid-October, Kapner telephoned Hoelscher. Kapner said that he had not talked to anyone from the Union, and asked whether there was any change in the parties' positions. Hoelscher replied that ''keeping any economics on the table was getting tougher and tougher.'' A few days later (see infra, fns. 18–19), at a Hoelscher-Pearson meeting arranged and attended by Kapner at which arrangements for another negotiating session were discussed, Hoelscher said that he was ''coming back with a brand new contract'' and that ''it was going to be a brand new ball game.'' Pearson told Hoelscher to ''bring it out and let us see it.''[18] A few days later, about October 20, Hoelscher told Kapner that Respondent's last offer had been withdrawn. Hoelscher further said that the persons who were operating the shop were tired of working 12-hour shifts, and Respondent was about at the point where it was going to have to hire replacement workers.[19]

Thereafter, Kapner telephoned Hoelscher that Kapner had not had a request from either party, so he was calling a meeting just to see what was going on on.[20]

C. *Bargaining Negotiations on November 7, 1988*

1. Introductory remarks by Hoelscher

The parties met again on November 7, 1988, their first meeting since October 4. Kapner began the November 7 bargaining session by stating that he had called the meeting since neither party had requested to meet and the strike had gone on for some time. Hoelscher asked Pearson whether he had any change in position, or anything to offer; Pearson said no. Then, Hoelscher stated that Respondent's previous offer was off the table. He said that during the strike, Re-

policy against loser-pays-all, except to the extent of what Pearson said his understanding was between August 18 and November 14.

[17] Rather similarly, Iltis testified that during this period, ''we did any job that we were told . . . There were no grievances or no complaints.''

[18] My findings as to this Hoelscher-Pearson conversation are based on Pearson's testimony. For demeanor reasons, I do not accept Hoelscher's denial that this Hoelscher-Pearson-Kapner meeting took place. In view of the contents of Hoelscher's remarks during these two incidents, I infer that his telephone conversation with Kapner came first. A mid-October date was given by Hoelscher as to the telephone conversation with Kapner, and by Pearson as to the three-man conference.

[19] I infer from the contents of Hoelscher's communication with Kapner about October 20 and of the Hoelscher Pearson conversation that the Hoelscher- Pearson conversation occurred first. The testimony of Rex and Iltis indicates that Hoelscher erroneously attached too a late a date (October 25) to his instructions from Rex to develop contract language which would enable Respondent to operate the plant the way Respondent was doing it during the strike. Hoelscher credibly testified, in effect, that before mid-October Rex said that Respondent should not give any across-the board increases, and that anything Respondent gave should be tied to productivity.

[20] This finding is based on Hoelscher's testimony, received without objection or limitation.

spondent had learned a lot of things having to do with flexibility and efficiencies and better ways to run the plant. He stated that Respondent wanted to present its ''last, best and final proposal,'' which Respondent hoped the Union would consider and sign. Hoelscher said that his proposal had many changes reflecting the knowledge which Respondent had acquired during the strike.

Then, Hoelscher gave the Union copies of a complete proposed agreement drafted by Respondent. He stated that Respondent had made a lot of changes; that some were not as drastic as they might appear; and that others had changed a lot. He went on to say that probably 95 percent of the parties' previous tentative agreements were as they were negotiated before the strike. Further, he said that a lot of the ''language changes'' were a result of what Respondent had learned from running the plant during the strike and what Respondent felt it needed in order to run the company and survive as a company in the future. Hoelscher said that he would go over Respondent's proposal in detail and, when he reached particular portions of the proposal, he would explain the reason, goal, or objective therefor. He said that Respondent would consider proposals by the Union for ''cosmetic'' changes; he did not explain what he meant by ''cosmetic'' changes, and the Union did not ask him.[21] Then, Hoelscher proceeded to go over the changes incorporated in Respondent's proposal.

2. Respondent's new proposals

Respondent's proposed contract included certain changes, with respect to the expired contract, which Respondent had never proposed before. Thus, Respondent sought to add, to the management-rights clause in the expired agreement, the words ''the management of the plant and the direction of the work force, including the right to hire, discipline, suspend, or discharge for just cause, to assign to jobs, establish and maintain standards of quality and quantity, to transfer employees within the plant, [and] to increase and decrease the work force.'' In addition, Respondent sought to amend the ''management work'' clause in the expired agreement, (1) so as to permit ''Employees not within the bargaining unit'' to perform unit work ''to meet customer requirements when necessary,'' and (2) so as to delete provisions which permitted nonunit employees to perform ''classified'' work ''on a pilot lot basis only,'' forbade use of the section to establish production standards or quotas, and permitted employee grievances for the time or overtime involved for work performed in violation of that section. Also, Respondent sought addition of a new provision permitting the hire of temporary employees for vacation replacements, at a lower minimum than for regular employees and without seniority rights or benefits. In addition, Respondent sought to eliminate restrictions imposed by the expired contract on its right to make temporary transfers of employees between jobs. More specifically, Respondent (1) sought to delete the provisions in the expired contract which restricted the circumstances under which Respondent could make such transfers, limited Respondent's right to select temporary transferees, and afforded employees certain rights to refuse such transfers; and (2) proposed a provision that a temporary transferee to a higher rated job than his regular job would be entitled to the higher rate after working in the higher-rated job for 4 hours (rather than two, as called for by the expired contract).

Also, Respondent proposed a provision shortening the time period within which employees who wished to retain their seniority had to appear for work upon recall from layoff, stating that such period was to begin to run on the date of mailing of certified mail or mailgram (rather than receipt, as provided in the expired agreement), and also permitting telephone notification; ''[s]uch notification shall conclusively be deemed to have been received.'' Further, Respondent proposed to shorten the period during which an employee could be absent without breaking seniority, and to delete the provision that absence for any length of time due to a compensable disability incurred during the course of employment would not break seniority if the employee returned to work within 30 days after final payment of statutory compensation.[22] Also, Respondent proposed a provision that Respondent had the right to recall striking employees after the effective date of the agreement without regard to seniority, and that employees not recalled at the end of the current strike would not be entitled to displace ''replacement workers.''

Further, Respondent proposed deletion of sentences in the expired agreement calling for continuance of regularly scheduled shifts, ''as in the past,'' and for negotiation with the Union regarding any deviation from the normal starting time. In addition, Respondent sought to delete a provision in the expired agreement that nobody would be required to work an unreasonable amount of overtime. Further, Respondent sought to cut the number of hours' work guaranteed to employees who were called back to work after completing their regular shift or called in to do emergency work on holidays or weekends, and to delete language which at least implied that such employees could decline to perform work which had not led to the call-back or call-in. In addition, Respondent proposed new limitations on employees' right to receive holiday pay, and proposed the option of providing compensatory time off rather than double time (in addition to holiday pay) to employees who were required to work on a holiday. Also, Respondent proposed shorter vacations for employees with less than 6 months' service and the absolute right to require work, and pay in lieu of time off, instead of a fourth or fifth week of vacation. In addition, Respondent sought the final and exclusive right to allot vacation periods and to change such allotments. Also, Respondent proposed

[21] My finding in this sentence is based on Pearson's testimony. He and employee committeeman Lucien Hendricks denied Hoelscher's testimony on direct examination that he said, ''Nothing is written in concrete or granite or whatever term you want to use that the goal is the important thing.'' For demeanor reasons, I credit Pearson and Hendricks.

Pearson also, in effect, denied Iltis' testimony that Hoelscher said Respondent would be willing to talk about any changes which the Union might wish to make which would be of major consequence. Because Iltis improbably characterized this as an explanation of Hoelscher's statement that Respondent's November 7 proposal was its last, best, and final offer, I do not believe that portion of her testimony described in this footnote.

[22] Under the expired agreement, seniority was broken after a specified period of absence for noncompensable disabilities. Respondent's August 1988 proposal sought like treatment of absence for compensable disabilities. However, by the end of the October 4 meeting this proposal had been dropped.

certain changes in the date on which employees were entitled to be paid their vacation pay.

Further, Respondent proposed a ''job evaluation'' clause under which Respondent could develop a new job description and wage rate, and could put that wage rate into effect after explaining it and the job description to the Union; but if the wage rate was installed without the Union's agreement, the affected employees could file under the contractual grievance procedure an unarbitrable grievance alleging that ''the job is improperly rated.'' In addition, Respondent proposed the deletion of a memorandum of understanding regarding assignment and rotation of heat treaters, and the deletion of letters of intent regarding rotation of transferees and continuation of starting up and shutting down equipment ''as has been and is presently being done.'' In addition, Respondent proposed to reduce to 5 the 22 labor grades called for in the expired agreement, to specify a minimum rate for each, and Respondent ''at its sole discretion, may grant merit increases in addition to the minimum rates specified above. Group leaders will receive a minimum of $.25 per hour over the classification they lead.'' The lowest of these proposed minimums for the respective labor grades was 10 cents an hour lower than the lowest rate called for by the expired agreement; the highest of these proposed minimums was lower than the rate called for by the expired contract for the seven highest labor grades. In addition, Hoelscher said that Respondent had proposed a profit-sharing plan, but that the Union had wanted to look at the books, and, therefore, Respondent was instead proposing a sales bonus plan ''for all eligible employees after the Company's gross sales exceed a predetermined 'floor' amount.'' Also, Hoelscher said that Respondent was ''considering,'' as ''one more thing'' which was not in Respondent's written proposal, a proposal for the use of part-time employees, who would be subject to the union-shop clause and accrue partial seniority, but would not be entitled to benefits, except pension benefits if they worked more than 1000 hours.

During this presentation, Hoelscher stated that Respondent had proposed combining job classifications, and increasing Respondent's right to make temporary transfers, because Respondent had found that making temporary transfers under the expired agreement was too time consuming. He further stated that Respondent had proposed the use of part-time employees because, prior to the strike, it had been almost impossible to hire good employees even at the rate Respondent was paying, and Respondent hoped it could obtain such employees by using employees with full-time jobs elsewhere or women with children.[23]

[23] Respondent had never before used part-time employees. Iltis testified that Hoelscher said the language of the expired agreement together with the language of the proposal already permitted Respondent to hire part-time employees. Although she testified that she ''probably would have considered'' any such comments as significant or important, and that she tried to include significant or important things in her notes, her notes do not include such comments. Accordingly, in the absence of corroboration and for demeanor reasons, I do not believe her testimony about such remarks by Hoelscher.

3. Respondent's proposals which had previously been dropped or compromised

Respondent's November 7 proposal also included some proposals which during earlier 1988 negotiations Respondent had either dropped or compromised. Thus, Respondent sought to reduce from 36 to 24 hours the period within which an employee could exercise his bumping rights, and remove a provision entitling an employee who had bumped into a lower paying job to receive for 30 days the rate associated with his old position. Also, Respondent proposed the elimination of double time after 11 hours of work on 1 day; and the elimination of a fifth week of vacation for employees with over 25 years of service (with the newly proposed exception that employees who were already receiving a 5-week vacation would continue to do so). Further, Respondent reduced the amount of accident and sickness benefits it had previously offered to provide. In addition, Respondent withdrew its previous proposal, to which the Union had agreed, to add stepchildren, and parents or stepparents but not both, to the relatives for whose death paid funeral leave was given.

4. Other proposals by Respondent

In addition, Respondent's proposal included some changes, in clauses included in the expired contract, to which the parties had agreed in earlier 1988 negotiations,[24] and at least one clause which during such negotiations the Union had previously proposed but later dropped—namely, shortening the period of service necessary to qualify for fringe benefits.

As to checkoff, Respondent's proposal was the same as its pre-October 4 proposal. As to arbitration, Respondent's proposal included certain changes already agreed to, and also the loser-pays-all proposal. When Hoelscher reached the loser-pays-all proposal, Pearson said, ''It won't be agreed to,'' and Hoelscher said, ''I understand.''[25]

5. Remarks after Hoelscher's presentation

After concluding his review of these proposed changes, Hoelscher expressed a hope that they would be acceptable to the Union's membership. He said that because newspaper articles and advertisements had led Respondent to believe that some of the employees might be unaware of or misunderstand Respondent's proposal, Respondent was going to send to all the employees a letter summarizing the proposed changes.[26] He further stated that the strike had lasted for 7

[24] Namely, an undertaking by Respondent to notify the Union prior to subcontracting and prior to issuing new rules and regulations; a clause providing for shift preference; deletion of a clause in the expired contract affording employees the right to opt for voluntary layoff, without loss of seniority or of recall rights, rather than bumping; a clause with respect to overtime equalization; a clause regarding active employees' claim to jobs from which they had been bumped; recall of laid-off employees; identity of paid holidays; inclusion of certain absences in time worked; grievance procedure; and insurance coverage of separated employees.

[25] This finding is based on Iltis' notes, partly corroborated by her testimony.

[26] My finding as to the point during this meeting when Hoelscher referred to the planned letter is based on Iltis' testimony and notes. Particularly because of these notes, I believe Hoelscher was mistaken in testifying that he referred to the letter before describing Respond-

weeks, that Respondent's personnel were tired of working 12-hour shifts, and that unless the Union accepted Respondent's proposal, Respondent would later that week begin to hire permanent replacements for the strikers. Hoelscher further said that if the employees went back to work, ''the supervisory personnel that was in there would still be working.''

Pearson remarked, ''With what you've given us, the strike will no longer be an economic one.'' Hoelscher replied that ''of course'' the strike remained an economic one, that Respondent had ''the right to change language.'' Pearson described Respondent's proposal in scatological language, and said that going through it would take the Union a long time. Hoelscher said that he would answer any questions. Kapner suggested that the Union needed more specifics to evaluate the sales bonus plan, and Hoelscher agreed. Pearson said that he wanted a copy of Respondent's proposed bonus plan, and Hoelscher agreed to supply one. Pearson said that ''even if we agree to this contract, we can't agree to loser pays all.'' Hoelscher replied, ''I understood you told me that was an International problem,'' and Pearson agreed that it was.[27] Employee committeeman Lucien Hendricks said, ''After looking at this briefly, some of the things are absolutely absurd for the working man.'' After discussing various problems relating to the replacement and return of strikers, the parties caucused.

During the caucus, Kapner joined Hoelscher and Iltis. He asked whether they were serious on the loser-pays-all issue. They replied that Respondent was definitely standing firm on that. Kapner said that the Union wanted to know whether Respondent could wait until the following Monday, November 14, before beginning to hire replacements, because the Union felt it needed additional time to look through the proposal. Kapner also asked whether Respondent could provide the Union with more specifics on the sales bonus plan. Hoelscher said that both requests could probably be granted, but he would have to check with Rex and then call Kapner. Kapner said that the Union wanted to know the rates Respondent intended to pay the returning strikers. Iltis and Hoelscher replied that they would be recalled at either their previous rates or the minimum rate of the job, whichever was greater; and subject to merit review, based on performance, which could raise or lower their respective pay. At Kapner's request, Iltis and Hoelscher so advised the Union.[28] Later that day, Rex advised Hoelscher and Iltis that it would be all right to hold off hiring replacements until November 14, when another bargaining session was scheduled. Hoelscher so advised Kapner, and stated that meanwhile, Hoelscher would try to get Kapner some information on the sales bonus plan.

D. *Events between the November 7 and the November 14 Bargaining Sessions*

On November 9, 1988, Respondent mailed to all employees in the bargaining unit a letter from President Rex. After stating that Respondent's sales, profitability, and employment had diminished, the letter went on to say:

> There are ten competitors in the immediate area, mostly all non-Union, who perform the same services as [Respondent]. They have higher sales productivity and less labor costs then we have, and they do not endure the countless hours of nonproductive grievance meetings and work slowdowns over frivolous issues that we have endured.[29]
>
> . . . .
>
> the decision has been made to irreversibly change the course of this business . . . . We will operate with much more flexibility in areas such as assignment of work to the employees we will have . . . .
>
> In keeping with this new direction, the attached summary sheet outlines the changes proposed in our final offer to reach an agreement with [the Union]. It is the last and final offer and the best that can be offered, and I urge you to consider it carefully and ratify it.
>
> If this final Contract is rejected, we will hire replacement workers who need not be terminated when the strike is over . . . .

Attached to this letter was a summary of some of Respondent's proposals which were pending as of the end of the November 7 negotiating session. This summary also stated that ''Recalled employees will be paid their old rate or the minimum rate of the job to which they are recalled, whichever is greater''; this was not in fact done (see infra, part II,H,L).

On an undisclosed date between the November 7 and 14 bargaining sessions, Respondent gave the Union some material explaining Respondent's proposed sales bonus plan.

E. *The November 14 Bargaining Session*

The November 14 bargaining session began at 10 a.m. The Union caucused until 10:15 a.m. Then, the Union asserted that Respondent's November 9 letter to the employees had ''upset the apple cart.'' After some discussion of the sales bonus plan, Pearson stated that the Union was prepared to forego any wage increase and to try the sales bonus plan to see how it worked.[30] He said, however, that there were some

ent's proposal. Although his testimony is consistent with his own notes, such notes are much sketchier than hers.

[27] My findings in these two sentences are based on Iltis' notes and her and Hoelscher's testimony. In view of such notes, I do not credit Pearson's denial. Heil and Lucien Hendricks were unable to recall any discussion of loser-pays-all on that day.

[28] My findings as to Respondent's statements about pay for returning strikers are based on Iltis' notes and testimony, which as to Respondent's allegedly planned pay policy contain the same assertions as a letter which Rex sent to the employees 2 days later (see infra, part,II,D) and Respondent's representations to the Union during the November 14 bargaining session (see infra, part II,E). Respondent did not in fact follow this policy (see infra, part II,H,L). Although Hoelscher testified that Respondent did not intend to pay a returned striker at least his prestrike rate unless he came back to his old classification, Hoelscher admitted that Respondent did not so advise the Union. Cf. infra, fn. 55.

[29] Rex testified that this paragraph was an expression of the same type of frustration which led to Respondent's loser-pays-all proposal.

[30] This finding is based on Hoelscher's testimony and on Iltis' testimony and notes. Although stating that the Union ''eventually'' accepted Respondent's proposal for a sales bonus plan, Respondent's opening brief states that Pearson ''initially indicated'' rejection (pp. 12–13). In support of this latter assertion, that brief relies on pp. 276 and 883 of the transcript. Page 276 includes Iltis' testimony that Pearson ''stated that his proposal was no wage increase and institute the Sales Bonus Plan to see how it works.'' Page 883 includes

Continued

things in Respondent's proposal that the Union could not live with. Hoelscher said that rather than give the Union a ''quick no'' he would like to see if the Union's proposals were substantive or cosmetic. Iltis and Hoelscher testified that, in substance, Hoelscher explained that Respondent would not alter its ''objectives'' and ''goals'' (such as moving people expeditiously around the plant), but would consider union proposals directed to meeting such goals in another way. In the absence of contradiction, I credit their testimony in this respect.

Pearson began his response by rejecting Respondent's new proposal that ''Notwithstanding any other provision in this Agreement to the contrary, the Company shall have the right to recall striking employees after the effective date of this Agreement without regard to seniority. Employees not recalled at the end of the strike . . . shall not be entitled to displace replacement workers.''[31] Pearson also stated that the checkoff matter was still up in the air. Then, he went through Respondent's remaining proposals in chronological order.

As to Respondent's revived proposal to eliminate certain provisions for double time after 11 hours of work on a single day, the notes and testimony of both Iltis and Hoelscher state that Pearson's comments as a whole left them uncertain as to whether he was accepting or rejecting this proposal. There is no evidence that Respondent asked him to clarify his position. Pearson asked questions, without expressing acceptance or rejection, about the new proposal regarding use of temporary employees for vacations, and the proposed new job evaluation clause. Pearson gave mumbling comments, which Hoelscher and Iltis could not understand, with respect to the newly proposed deletion of language calling for continuation of regularly scheduled shifts; there is no evidence that they asked him to repeat his comments. Pearson expressed opposition to the newly proposed management work clause; to Respondent's new proposal to change from 2 hours to 4 hours the period during which a temporary transferee had to work at a higher rated job before being paid the higher rate, to the newly proposed deletion of a clause permitting an employees to reject a temporary transfer so long as a junior employee was available who could perform the work, to the newly proposed deletion of a clause requiring posting and notification to the Union of temporary transfers of more than 1 day, and to the newly proposed provision that an employee on layoff status would be conclusively presumed to received a telephoned recall message. He objected to the deletion of certain language from the overtime-equalization clause.[32] Also, he objected to the newly proposed deletion of the language in the expired contract that no employee would be required to work an unreasonable amount of overtime; to the newly proposed changes with respect to the expired contract regarding call-back and emergency call-in (which changes reduced the minimum hours guarantee and eliminated the employee's option to refuse to perform work other than that for which he had been called); to a proposed withdrawal of all holiday pay from employees who failed to work their full scheduled workdays before and after the holiday; to a proposed limitation on the number of paid holidays to employees absent due to compensable illness or injury; to a proposal that employees who were required to work on a paid holiday could at Respondent's option receive compensatory time off rather than (in addition to the holiday pay) double time; and to the elimination, as to employees with less than 20 years' service as of June 1988, of a fifth week of vacation after 20 years' service. The Union stated that Respondent's proposal as to the grievance procedure was ''okay'' except for the loser-pays-all clause, which was unacceptable; Pearson told Hoelscher that it was an International policy that there would be a 50–50 split. Also, Pearson wanted Respondent's proposed sickness and accident benefits to be increased to $200 a week (the amount to which the parties had previously agreed beginning the second year of the contract term) from $180.

As previously noted, the Union had refused on October 4 to sign the sign-off sheet prepared by Respondent as to funeral leave, on the ground that as to the length of the leave for the death of certain relatives the sheet inaccurately reflected the agreement reached during negotiations. Hoelscher testified that Respondent then told the Union that as to this matter, Respondent's representatives would consult their notes; and he further testified, ''That wasn't a big issue.'' The sign-off sheet added stepparents and stepchildren to the relatives for whose death funeral leave was provided; these relatives were deleted from Respondent's November 7 proposal, which as to funeral leave was the same as the 1985–1988 agreement. When Pearson reached this clause, two members of the employee bargaining committee (John Hodum and Gary Kaminski) pointed out this change, and Hodum said, ''We want step-children.''

In addition, Pearson questioned the deletion of a memorandum of understanding regarding assignment and transfer of Heat Treaters A and Heat Treaters B; Respondent pointed out that its proposed new job classifications did not include these. Also, as to the proposal that an employee would lose seniority after an absence of 1 year (or less, if he had less than a year's service) for any reason, the Union said that it could not agree if the clause extended to an employee out on workmen's compensation.[33]

In reviewing Respondent's proposals, Pearson made little or no comment as to Respondent's newly proposed expansion of the management-rights clause, Respondent's newly proposed deletions of limitations on Respondent's right to make temporary transfers, Respondent's proposed reduction from 36 to 24 hours in the period for exercising bumping rights, Respondent's new proposal shortening the period of absence which would cause loss of seniority,[34] Respondent's newly proposed limitations on the vacation benefits of employees with less than 15 years of service, Respondent's newly proposed changes in vacation pay dates, Respondent's

Hoelscher's testimony that Pearson ''said we can go with no wages no wage increase and we can accept the bonus plan. We will see how that works out . . . .''

[31] During the November 7 bargaining session, Respondent had told the Union that Respondent did not need all of the 60 bargaining unit employees who had worked for Respondent before the strike. As of November 14, no permanent replacements had been hired; a total of two permanent replacements were hired before the end of the strike.

[32] Although the nature of this language is unclear, it may have related to double time for Saturday work assigned to equalize overtime.

[33] This finding is based on Iltis' and Hoelscher's notes, which as to this matter I regard as more reliable than Pearson's testimony that he advanced no objection to this proposal.

[34] Except that the Union protested including absences on workmen's compensation.

new proposal affording it the right to allot and change vacation periods, or Respondent's newly proposed deletion of letters of intent regarding rotation of transferees and starting up and shutting down equipment.

Pearson finished his presentation by stating that if the Union ''got some consideration'' of its requested changes and the rates of pay stayed as they presently were, the parties could possibly come to an agreement. Hoelscher and Iltis asked whether Pearson's position meant keeping all 22 of the existing labor grades. He replied yes, and that he ''couldn't accept'' the job groupings as Respondent had proposed them or the proposed merit review program. Respondent stated that during the last meeting, Respondent had told the Union that each returning striker would come in ''at his old rate, or the minimum of the new job, but it could go up or down'' depending on the periodic merit review.[35] Pearson said that the Union did not want the periodic review, because ''someone could come in'' at higher than the new minimum rate for his job grouping and then have his rate reduced in consequence of the periodic merit review. Hoelscher and Iltis asked whether the Union's position was that it did not want ''them'' reviewed up or down. The Union said yes.

At this point, the parties separated for a 6-minute caucus. The union bargaining committee agreed, in Kapner's presence, that the Union would accept Respondent's proposed job grouping, if the Union was allowed to grieve on the merit review and the grouping. After absenting himself from the room for a few minutes, Kapner returned and said that Respondent had rejected this proposal. After that, the union committee agreed, in Kapner's presence, that it would accept the grouping without the grieving, but would not accept the merit review without the grieving. Kapner again left the room. On his return, he told the Union that Respondent had rejected this proposal.[36] After another union caucus, Hoelscher and Iltis returned to the conference room. Pearson told them that he would accept Respondent's proposed groupings, but would accept a merit increase review only if the Union had a right to grieve it. Hoelscher rejected this proposal.[37] There is no evidence that at this or any other time, anyone referred to the no-strike clause which had been included (in the language of the expired contract) in all proposals by both parties, and which does not in terms permit or forbid strikes as to nongrievable matters.

Hoelscher said that he had told the Union at the November 7 session that this was Respondent's last and best offer. He went on to say that the parties should discuss any union-proposed changes which were not of ''great substance.'' However, Hoelscher said, most of what the Union had mentioned was ''very substantive'' in that in a lot of cases Pearson had reverted back to the language of the expired agreement; Respondent had learned a lot from the period of the strike; and Respondent had to have what it had put into its proposal in some fashion. Hoelscher said that if the Union had any recommendations on language changes in order to accomplish Respondent's objectives, Respondent would certainly be willing to sit and listen, but (referring to the document which constituted Respondent's complete proposed contract) ''this is the contract.'' Pearson said, ''Well, you know where we stand.'' Then, Hoelscher said that Respondent would start hiring permanent replacements.

At this point, Kapner asked Hoelscher and Iltis to wait in the hall a minute. After Hoelscher and Iltis had left the conference room, the union representatives, at least, expressed the opinion that Respondent was not bargaining in good faith.[38] Then, Kapner left the conference room and told Hoelscher and Iltis that the Union was claiming that Respondent was not bargaining in good faith and thought Respondent had taken everything away. Hoelscher denied taking everything away, and said that a ''lot of the changes'' had been previously agreed upon between the parties (see supra, fn. 24). Hoelscher testified to telling Kapner that the union representatives ''are not addressing any of our problems or goals. They are just saying yes or no and it is mostly no and the alternative proposal is go by the old contract and that just isn't going to cut it.'' Hoelscher went on to testify to telling Kapner that Respondent was willing to consider union proposals if they were ''cosmetic. If it is just the language or how we get there like if we are going from how we get there we are willing to bend it, massage it we will do whatever we have to. We have to have the ability to move people. We will accommodate other problems they have, but we have to achieve some of these goals. We have to run the plant in a new fashion.'' Hoelscher went on to tell Kapner, according to Hoelscher's testimony, that Pearson ''just literally read everything back from the old contract right back in,'' and that as to merit review, temporary transfers, temporary employees, and part-time employees, ''all of the major things they read right back to us was in the old contract . . . . We want them left in the contract. [The

[35] This finding is based on Iltis' notes, which as to this November 14 statement are undisputed.

[36] My findings as to Kapner's statements to the Union are based on Lucien Hendricks' testimony, received without objection or limitation. The testimony of Iltis and Hoelscher about what Kapner told them does not distinguish between his two visits. Iltis testified that Kapner said Pearson could accept Respondent's proposed groupings. Hoelscher testified that Kapner said the Union was willing to accept Respondent's proposed groupings, but not the review process, and everybody had to maintain his old rate. From the probabilities of the case, I believe that on both occasions Federal Mediator Kapner conveyed the Union's proposals accurately and completely. However, there is little materiality to just what he did tell Respondent; see infra, fn. 37.

[37] My finding that Pearson presented his position directly to Hoelscher and Iltis is based on Iltis' testimony and notes, partly corroborated by employee committeeman Heil; because of such notes and demeanor considerations, I do not credit Hoelscher's testimony that he and Iltis were advised of the Union's position through Kapner alone, or Pearson's and Lucien Hendricks' testimony that Hoelscher and Iltis did not return to the conference room after Kapner conveyed their second message. My finding as to the substance of the Union's expressed position is based on Pearson's testimony. For demeanor reasons, I do not accept Iltis' testimony that at this time, Pearson agreed to the job groupings but said that he did not want the merit review program, and that she did not ''believe'' the Union ever said it would accept a merit review program if grievances could be filed over individual reviews. As to this matter, Iltis' notes state that Pearson said, ''We'll accept the grouping as you have it, but no review.''

[38] This finding is based on Hendricks' testimony, which is indirectly corroborated by Hoelscher's and Iltis' testimony about Kapner's subsequent remarks to them. Hendricks and Pearson testified that Kapner expressed agreement with this view. Because any such opinion by Kapner would as to an ultimate issue in the case have negligible probative value, I need not and do not determine whether he so stated.

Union hasn't] addressed our problems.''[39] Hoelscher went on to testify that Kapner then asked whether Respondent was firm on these issues; that Hoelscher said yes; and that Kapner then said he did not think there was much need to continue meeting at that time. Because Iltis did not corroborate Hoelscher's testimony with respect to this conference with Kapner, I am inclined to disbelieve Hoelscher's testimony that he and Kapner made such remarks. In any event, the principal relevance of such testimony—namely, what it shows about Hoelscher's state of mind—is not substantially affected by whether he in fact expressed it to Kapner; see infra, part II,M,1,a.

At this point, Hoelscher and Iltis left the premises. The parties had met that day for a total of 1-1/2 hours, including the caucuses after their first discussions.

As of the end of that meeting, no arrangements had been made for any future meetings between the parties. Late in the day on November 14 or on the morning of November 15, Pearson advised Iltis that the Union was going to conduct a ratification meeting on Wednesday, November 16, for the membership to vote on Respondent's November 7 proposal. This proposal (including the loser-pays-all clause and the checkoff clause) was presented to the membership, without recommendation one way or the other. The membership rejected the proposal, and decided to remain on strike, because of the ''key issues'' of ''an insurance plan and money''; the foreman working proposal was not discussed at that meeting. Iltis testified that if the employees had voted yes, ''I would assume we would have had an agreement.'' Meanwhile, between November 14 and 16, Respondent hired two permanent replacements for strikers.

F. *The Union's November 16, 1988 Request for Reinstatement and for Resumption of Negotiations*

At about 12:30 p.m. on November 16, Pearson came to the lobby of the plant and asked the receptionist for Rex. On receiving this message, Rex asked Iltis to accompany him to the lobby. When they reached the lobby, Pearson told them that Respondent's proposal had been unanimously rejected. Then, Pearson gave an envelope to Rex, who told him to give it to Iltis instead, that Rex had nothing to do with negotiations. Then, Rex or Pearson gave the envelope to Iltis, who opened it. The envelope contained a handwritten letter to Rex, dated November 16 and signed by Pearson, which stated, ''By this letter, the union unconditionaly [sic] offer [sic] to return to work.'' After reading the letter to herself, she said, ''Okay.''

When Rex and Iltis came into the lobby, Pearson had been standing about 2 feet inside the lobby door. By the time Iltis had finished reading it, he was leaning against the door. He said, ''We'll need to continue negotiating.'' Iltis said, ''I understand.'' Without a statement from Pearson or (so far as the record shows) anyone else about a specific date for negotiations or how one was to be set up, Pearson left the building.[40]

Rex testified that after Respondent received the Union's Wednesday, November 16 request for reinstatement and beginning on a day while the picketing was still in progress, management conducted a series of meetings during which

> [W]e began formulating our plans as to the positions that we needed to fill, the number of people that we needed to fill the positions and reviewing those employees who were qualified to be able to fill those positions.
>
> at that point we had a core group of current production people and . . . some of the people that had assumed some sales responsibilities, but now were back in the shop and we would discuss the positions that we needed . . . we felt that to be effective and to be successful on a financial basis . . . we had to parallel a similar method under which we had been operating.

Iltis, who attended some of these meetings, testified that it was there determined that the criteria to be used in the selection process would be the employees' skill and ability and their records ''as related to discipline, attendance, [and] the way that they performed in the past.''

The picketing which had begun about the beginning of the strike continued until after the start of the business day on Friday, November 18. On that day, Pearson telephoned Iltis, advised her that the pickets had been removed, and asked about the help-wanted advertisements for replacement workers which he had seen in the newspapers after he had given Respondent the application for reinstatement. Pearson said that the Union intended to go to the NLRB about the matter. Iltis said that Respondent had ordered these advertisements before receiving the application, and had been unable to cancel them. Pearson said that he would have to check with someone and would get back with Iltis that day. He did not call her that day, and the pickets reappeared about an hour after his telephone call.

G. *The Union's November 21, 1988 Request for Reinstatement and for Resumption of Negotiations*

After returning, the pickets continued to patrol the plant until about 12:30 p.m. on Monday, November 21, when Pearson and employee bargaining committee member Lucien Hendricks came to the plant and met with Iltis in the

[39] The record otherwise fails to show what, if anything, the Union during the November 7 and 14 negotiations said regarding the use of part-time employees, which Respondent orally mentioned at the close of its November 7 presentation. As to the Union's position with respect to the other issues mentioned in Hoelscher's testimony, see supra, part II,E, which findings are largely based on Iltis' notes and her and Hoelscher's testimony.

[40] My findings as to the events in the lobby are based on the parties' stipulation, on a memorandum note which Iltis attached to Pearson's letter, and on a composite of credible parts of the testimony of Pearson, Iltis, and Rex. As to Iltis' oral response to the letter, for demeanor reasons I credit Iltis over Pearson, who testified that she replied, ''I understand''; Rex did not testify about this matter. As to Pearson's remarks about bargaining, I accept the version in Iltis' notes, which she made relatively soon after the incident, over her oral testimony and over the testimonial versions of Rex and Pearson. As to Pearson's physical acts (about which he did not testify) while making these remarks, I credit Iltis over Rex for demeanor reasons. As to Respondent's response to these remarks, for demeanor reasons I credit Pearson and reject Iltis' testimony that neither she nor Rex replied at all.

lobby.[41] Pearson said that the pickets were now gone for good, and that he had ''screwed up'' by putting them back on Friday. Then, he gave her a letter, signed by him and directed to Rex, which stated, ''By copy of this letter, once again, we repeat our prior offer to unconditionally return to work.'' Iltis replied that Respondent was ''working on it and it would be soon.'' Pearson said that the Union still wished to continue negotiations; she replied, ''all right.''[42] He said nothing about delaying the hiring of replacements or about delaying the implementation of any of the provisions of Respondent's last offer.

H. *The Recall of Strikers in November and December 1988*

Rex testified that when he read the Union's Wednesday, November 16 request for reinstatement he was uncertain as to what it meant ''plus the pickets were still out there. I wasn't sure if we were on strike or weren't on strike or they agreed to come back or just exactly what was happening.'' He went on to testify that on Monday, November 21, Respondent ''still [was] zeroing down on the number of people that we wanted in the positions.'' Iltis testified that between November 16 and 21, Respondent did not do anything substantial about recalling the strikers, because the application for reinstatement had come as somewhat a surprise to Respondent[43] and because ''Mr. Pearson came in on Wednesday [November 16] with a letter that they were unconditionally offering to return to work but the pickets did not disappear until Monday [November 21] afternoon . . . I felt that if they were offering to return to work, they should not still be picketing the plant. So, I did not know if his offer was sincere.''

Iltis' notes reflect that her Monday, November 21 conversation with Pearson and Hendricks took place at 12:30 p.m. She credibly testified that because Pearson had asked her to inform him who was going to be called back, she called him about 4:30 p.m. on Tuesday, November 22; told him that Respondent was now prepared to give him a listing of the names and addresses of the first group of people Respondent would be bringing back; and asked him whether he wanted it. She credibly testified that Pearson initially said he did not feel that he needed it, because he had told Lucien Hendricks to telephone the strikers that they would be recalled. Iltis went on to credibly testify that she again asked Pearson whether he was sure he did not want the list, he then said to go ahead, and that she then ''gave him the list of names that we were going to start calling.'' Although the record fails to show the number or identity of the persons on this list, Rex testified that as of Monday, November 21 (the day before this Iltis—Pearson conversation), Respondent had heard that a number of the strikers were not coming back; and Respondent's opening brief (p. 15) describes the list which she gave him as ''a list of the names of the employees that the Company would initially recall.'' At about 5 p.m. on Tuesday, November 22, about a half hour after giving this list to Pearson, Iltis began to make a ''first call'' to employees. During each such ''first call'' she asked the employee if he or she was ''ready, willing and able to return to work . . . someday the following week. Although, I could not give them a definite date or job or shift until I talked to the majority of the people so that we would know where we were going to put the people.''

On November 22, Iltis attempted to telephone about 14 of the approximately 56 strikers, 10 of these 14 being alleged discriminatees (Reynolds, Copenhauer,[44] Antonacio, Leotta, Vallejo, Waldspurger, Homan, Bennett, Carreras, Clarke). Of these 14, she made contact with about 8 on that day, including 6 alleged discriminatees (Reynolds, Antonacio, Leotta, Vallejo, Waldspurger, Carreras). All of these eight except Carl Lingenfelter, who is not named as a discriminatee, told her that they wanted to return.[45] On the following day, Wednesday, November 23, she attempted to telephone about 28 strikers, 21 of whom are alleged discriminatees (Hinkle, Zeigler, Felder, Novotny, A. Smith, Ordille, Lott, Denton, Mastromatto, Lopez, Rivera, Ball, Rosa, R. Kreuson,[46] Landis, Famularo, Heil, Cute, Frederick, Schoch, Samuelson). Of these 28 whom she first called on November 23, she made contact that day with 17, including 11 of the alleged discriminatees (A. Smith, Ordille, Lott, Denton, Mastromatto, Lopez, Rosa, R. Kreuson, Famularo, Heil, and Cute). In addition, she made contact on November 23 with four of the strikers whom she had called but had been unable to make contact with on November 22, including three alleged discriminatees (Copenhauer, Homan, and Clarke). All the alleged discriminatees stated that they wanted to return. The record is unclear as to what the others told her.[47] By the time she left the plant on Wednesday, November 23, 1988, the day preceding a 4-day Thanksgiving weekend during which the plant was closed down, she had tried to reach 31 of the 42 alleged discriminatees, and had in fact made contact with 20 of them. There is no evidence that she tried to, or did in fact, make contact with any of the strikers on November 24 (Thanksgiving Day); Friday, November 25; or Saturday and Sunday, November 26 and 27.

[41] During the strike, the plant did not operate on weekends. The record fails to show whether picketing took place on the weekend of November 19–20 or, for that matter, on any previous weekends.

[42] My findings in this sentence are based on a composite of credible parts of the testimony of Pearson and Lucien Hendricks, both of whom testified to the request to continue negotiations. For demeanor reasons, I believe Hendricks' testimony as to her reply, to the extent that it may differ from Pearson's testimony that she said that ''she understands, or something to that effect.'' To the extent that her testimony may differ from the testimony of Pearson and Hendricks, I do not believe her testimony that Pearson's oral remarks at that meeting were confined to picket matters, that her oral remarks were confined to the reinstatement matter, and that he did not request a meeting.

[43] As previously noted, at the November 7 meeting the Union had asked (through Kapner) what Respondent intended to pay returning strikers; and at the November 14 meeting Respondent had reiterated its position as to their pay and had stated that it intended to start hiring permanent replacements. Iltis attended both meetings.

[44] Also referred to in the record as Copenhaver.

[45] As to Lingenfelter, her notes state ''Not returning—Quit (11–23).''

[46] Also referred to in the record as Krewson.

[47] As to these seven, Iltis' compilation of the results of her telephoning contains the entry ''not returning—Quit.'' The ''Quit'' dates range from November 23 to December 23. As to K. Smith and Prince, her compilation suggests that they told her on November 23 that they wanted to return; that Smith told her on November 29 that he would not return on November 30, the date he was told to report; and that Prince failed to report on December 5, the day he was told to report.

On Monday, November 28, the day after the Thanksgiving weekend, Respondent began to turn on the equipment and furnaces, which had been turned off on the Wednesday preceding Thanksgiving Day, and to get them heated up. Also on November 28, Iltis telephoned 43 strikers to give them reporting dates later that week or on the following Monday, December 5. Of these, 13 (8 of whom are alleged discriminatees) were told to report to work on Tuesday, November 29;[48] 9 (7 of whom are alleged discriminatees) were told to report to work on Wednesday, November 30;[49] 8 (all alleged discriminatees) were told to report to work on Thursday, December 1;[50] and 12 (9 of whom are alleged discriminatees) were told to report to work on Monday, December 5.[51] Rex and Iltis testified that the strikers who were recalled effective November 29 worked the day shift that day and the third shift on and after November 30; that the strikers recalled on November 30 worked the first shift that day and the second shift on and after December 1; that the strikers who were recalled effective December 1 worked the day shift that day and and all times thereafter; and that the strikers who were recalled effective December 5 worked the day shift that day and various shifts thereafter. Also recalled effective December 5 was alleged discriminatee Ordille. Iltis first made contact with him on November 23, on which date he told her that he wished to return to work. However, she made no subsequent contact with him until Thursday, December 1, on which date he was given his December 5 reporting date. Iltis made no effort to reach alleged discriminatee William Stotsenburgh III until Wednesday, December 7. She made contact with him on that day, and on December 8 she offered to recall him. He accepted, and returned to work that day.

Respondent's part-time temporary employees were let go on Tuesday or Wednesday, November 29 or 30. The full-time temporary employees continued to perform unit work through Friday, December 2, and were then terminated. All the management, supervisory, and clerical employees also performed unit work through December 2. The following week, most of the clerical employees resumed performing their regular, nonunit clerical work, although some of them continued to perform unit work on a periodic basis. Supervisors continued to perform unit work until full-time supervisory work was available for them. As discussed infra, eight alleged discriminatees were not recalled until various dates between March 1 and April 24, 1989.

Of the 34 alleged discriminatees who accepted Respondent's 1988 offers of recall, 19 were paid the same as they had been paid before the strike,[52] 5 were paid less,[53] and 10 were paid more.[54] Respondent changed its job classifications just before the strikers returned to work. The General Counsel's opening statement conceded, in effect, that all of the alleged discriminatees were eventually offered reinstatement. Accordingly, I need not and do not consider whether the record would otherwise support a reinstatement finding.[55] Of the strikers whose poststrike pay differed from their prestrike pay, only three (Antonacio, Denton, and Lopez, all recalled as inspectors) were paid at any minimum rate specified in Respondent's November 7 proposal. Each of these received an increase from $9.98 to $10.

I. *Remarks by Rex Upon Strikers' 1988 Recall; Alleged Unlawful Interrogation*

During the 4-day Thanksgiving weekend after the Union's second request for reinstatement, Rex discussed the matter with his wife, a licensed psychologist who had worked in the plant. She recommended that he ''express some feeling and really try to open up some dialogue between [him] and the rest of the people and explain where we were at and what we were doing.'' In view of her recommendation, and in order to elicit more responses and ideas from the employee audience, Rex decided to give a series of orientation meetings in the induction area for the returning strikers, and prepared an outline of the remarks he intended to make at all of these meetings. All of these meetings were attended by Rex, Iltis, the heat treat supervisors, and the managers.

Eight strikers returned to work on November 29, 1988. The first such meeting was held at 7 a.m. that day. Rex opened that meeting by saying that he ''wasn't too sure he wanted [the strikers] back there,'' and generally complained about their being on strike and about picketing by union members who were on workmen's compensation.[56]

At this point, Rex made essentially the same remarks that he made at the remaining striker orientation meetings. He

[48] The alleged discriminatees so advised were Hodum, Reynolds, Copenhauer, Antonacio, Hinkle, Zeigler, Felder, and Leotta. A November 29 reporting date was also given to the following employees, not alleged to be discriminatees, who did not report to work and quit: Camburn, Fillman, Barber, Suttle, and Beeman.

[49] The alleged discriminatees so advised were Vallejo, Novotny, A. Smith, Waldspurger, Homan, Lott, and Denton. A November 30 reporting date was also given to K. Smith and Burycz, not alleged to be discriminatees, who did not report to work and quit.

[50] Bennett, Mastromatto, Lopez, Carreras, Rivera, Ball, Rosa, and Clarke.

[51] The alleged discriminatees so advised were R. Kreuson, Landis, Famularo, Heil, Cute, Frederick, E. J. Smith, Schoch, and Samuelson. A December 5 reporting date was also given to Prince, Brown, and Miller, none of whom is an alleged discriminatee, and all of whom failed to report for work and quit.

[52] Ball, Carreras, Clarke, Cute, Hinkle, Homan, R. Kreuson, Landis, Leotta, Mastromatto, Novotny, Ordille, Reynolds, Rosa, Schoch, A. Smith, E. J. Smith, Waldspurger, and Zeigler.

[53] Famularo (down from $9.81 to $8.97), Felder (down from $11.12 to $9.81), Heil (down from $9.81 to $9.64), Hodum (down from to $9.81 to $9.64), and Stotsenburgh (down from $10.15 to $8.97).

[54] Antonacio (up from $9.98 to $10), Bennett (up from $11.65 to $11.72), Copenhauer (up from $9.81 to $11.12), Denton (up from $9.98 to $10), Frederick (up from $7.97 to $9.64), Lopez (up from $9.98 to $10), Lott (up from $8.47 to $8.97), Rivera (up from $8.46 to $9.64), Samuelson (up from $8.46 to $8.97), and Vallejo (up from $9.81 to $11.12).

[55] If sustained, the General Counsel's contention that Respondent's unilateral changes violated its bargaining obligation calls for an order which would compensate the alleged discriminatees for monetary losses entailed in connection with differences between their prestrike and poststrike jobs or job classifications. See ''The Remedy,'' infra. Iltis testified that ''No one got a lower rate than . . . they would have gotten had they worked that same job prior to the strike.''

[56] This finding is based on the testimony of returning striker Ann Antonacio. Rex's testimony about what he said did not distinguish between the four meetings; rather, he testified, while inspecting the outline which he had used, ''I would begin by welcoming the people back.'' For demeanor reasons, as to his remarks at this first meeting, I credit her.

said that during the strike, Respondent had achieved nearly the prestrike level of production, by operating with only 22 permanent and 10 temporary personnel, who worked long hours; and that Respondent had learned about some of the bottlenecks in Respondent's business and a lot about pricing, costing, and material handling, and had identified some areas of insufficient return for Respondent's effort. He went on to say that during the strike, Respondent had found some supervisors to be more able than others to solicit cooperation; and that supervisors and employees had to be able to communicate better with one another. Rex said that during the strike, Respondent had learned of the need for teamwork and flexibility. Further, he said that before the strike, Respondent had made the best offer available in view of Respondent's history of declining sales and profits, and without assurance of increased productivity of sales. He said that at the time of the strike Respondent had not changed health insurance and pensions (as had been reported in some of the local papers), that Respondent wanted to drop the fifth week of vacation, but that when negotiations ''ended in September'' Respondent intended to continue with it. Rex said that at the time of the strike he had had three options—namely, (1) to settle the strike for whatever the cost, but such action would have been ''financially unsound'' and would have caused a ''short term life'' for the Company; (2) to close the plant down permanently; or (3) to operate with the ''non-union employees'' who did not strike and to shrink the business to the scale where Respondent could manage with relatively few people. He went on to say that management had decided on the third option ''basically to work the plant and operate the plant as best we could.'' Rex said that the nonunion employees had elected to work and save their jobs, and that in one sense they had saved the jobs of the people who were returning. Rex said that there had been some ugliness on the picket line, including personal comments directed at him and his wife and at several other people who were working;[57] and that he questioned why he should continue to work with or for people who had such animosity toward him and Respondent. Rex said that before the strike he had felt a strong obligation to provide continued employment to the people who had worked in the plant for a long time; but that after what he had seen on the picket line and after such a long strike with 100-percent rejection of the contract, which he felt was the best that Respondent could offer at that time, he was not so sure, and only time would tell. Rex said that if he could not run a business which employs people whom he respected and who respected each other, he did not really need to run a business of this type.[58]

At this point, Rex said that many good people had chosen to quit and not come back to work with Respondent after the strike. He asked the group whether anyone knew why these people had quit, and asked Iltis to write down the responses on a large flip chart. As previously noted, he had decided to use this procedure as a means of generating a dialogue between him and the employees and eliciting more responses and ideas from his audience; but he did not so advise the employees.[59] Nobody answered. Then, he directed this question to each of the eight employees individually; but if a particular employee did not respond, Rex went on to the next one. Iltis recorded these answers on the flip chart as ''(1) Found other employment (2) Lack of communication (3) Tired of 'bumping heads' (4) Injured by Co. (5) New opportunity.'' She did not record the names of the employees who answered this question.

After that, Rex directed a general inquiry to those present as to why they had bothered coming back. Nobody answered. Then, he specifically directed this question to Local Union President Hodum, a member of the union bargaining committee. Hodum said that he was 48 years old, and it was too hard to find a job at his age. Rex specifically directed this question to Hinkle and at least two other returning strikers, all of whom replied that they needed their jobs. Rex specifically directed this question to employee Antonacio, who replied that she was not sure she was back.[60] Rex's question was answered by all the employees to whom he directly put it, but not by anyone else. Iltis put down their answers, but not their names, on her flip chart. However, she did not put down Antonacio's reply.[61]

As discussed to some extent infra, the questioning and the flip-chart procedure took place at all of the other striker orientation meetings. Afterward, at all of the meetings, Rex used the flip chart to describe his views about Respondent's purpose—to be profitable; to provide its employees with good wages and benefits and satisfying employment; and to provide customer service and quality at a fair price. Then, he described what he believed should be Respondent's values and philosophies, attaching importance to honesty, mutual respect between employees, job satisfaction for each individual, and fair pay for a fair effort. He said that teamwork, flexibility, and communication were very important. He said that if Respondent was successful, all the employees should benefit. He went on to say that Respondent was in many ways like a business starting over, and that he believed the existing building, equipment, and customers, and the good employees returning to work, would be successful in allowing Respondent to continue as a business. At this point, he

[57] He testified that he was referring to ''a lot of gestures and a lot of name calling and . . . stones that were thrown . . . tires that were slashed and a lot of nasty things that were said and just a general attitude of ugliness.'' There is no other record evidence regarding this matter.

[58] My findings in this paragraph are based on Iltis' testimony, Rex's testimony, and his outline, which he followed during his presentation during all of the orientation meetings. Their testimony did not differentiate between the meetings. I find that he made at all the meetings the statements set forth in the paragraph to which this footnote is attached. As to the first meeting, such testimony was partly corroborated by Antonacio; as to the December 5 meeting, such testimony was partly corroborated by returning strikers Esau Jeffrey Smith and Carson Heil.

[59] My finding that he did not so advise the employees is based on the testimony of Iltis, who was present throughout all the meetings, that he did not give her any reasons for asking her to make entries on the flip chart.

[60] At that time, she was not sure whether she wanted to remain in Respondent's employ. That day, she had been assigned to a shift other than her prestrike shift, to which, however, she was moved the following day. She resigned from Respondent's employ about a month after her return, because of (she testified) ''things in general in the shop I did not agree with.'' At the time of her resignation, she had been in Respondent's employ for more than 9 years.

[61] Although the sheets from the flip charts are in evidence, as to this question the record fails to show which sheet was prepared at which meeting. Every sheet has at least five entries, none of them reflecting Antonacio's reply.

asked Iltis to explain what he testimonially described as ''some of the contract changes or some of the changes that we had put into the last offer . . . that were different from the preceding contract.'' Then, Iltis reviewed the attachment to the November 9 letter which summarized such differences. In the course of doing this, she stated that there were fewer job descriptions, that people were able to perform a number of tasks in those job descriptions, that a bonus plan was associated therewith, that a professional job evaluator was going to prepare new job descriptions in the near future, and that thereafter Respondent would be developing a merit review plan which (Respondent hoped) would take effect within 90 days.

After Iltis' presentation, Rex stated that the future task was to develop ''the teamwork and cooperation that . . . I felt . . . really worked well'' during the strike; that the change in job classifications would allow for more flexibility; and that in order to ''get work out the door,'' management would sometimes be working beside unit employees and maintenance employees would sometimes perform production work. He stated that a lunchbreak would be afforded the employees who had not previously had one, and that pending the construction of a lunchroom, a temporary area had been set up in the plant induction room where employees could eat their lunch. He told the employees to ''use a fair amount of discretion'' in taking washup, cleanup, and coffee breaks. He said that no merit review plan had yet been formulated, but gave some of ''the points that it might incorporate''; and that there would be a bonus sales plan, which had not yet been totally formulated, because if Respondent was successful he wanted the employees to share in that success. Rex stated that there would be monthly meetings of all employees on the third Saturday of each month. He said that the forthcoming review process might lead to the separation of marginal employees who proved unable to perform, as well as to reward other employees. He said that he hated to have all the rules that Respondent had had in the past, that it was the good employees who got the most upset about the rules and were discouraged in performing their tasks, and that it was the 10 percent of poor employees for whom 90 percent of the rules were developed and who were disciplined for breaking them. He said that the attendance system had probably been Respondent's biggest problem. Rex said that management had been instructed not to be arrogant or vindictive or abusive, and that employees should let him know if they believed any management personnel was out of line and he would deal with it; ''I expect the reverse to be true also.'' At the conclusion of the November 29 orientation session, returning strikers Hodum and Reynolds left the plant.

Rex began the remaining striker orientation meetings by welcoming the strikers back; laying to one side the events involving the questioning and flip charts, his and Iltis' remarks were essentially the same as described above in connection with the first meeting. The December 5 meeting was attended by returning strikers who included Heil and E. J. Smith.[62] During the questioning/flip-chart portion of the meeting, Rex asked the group generally why some of the strikers had not returned to work. Nobody volunteered a reply. Then, Rex put this question to each returning striker individually. When so questioned individually, E. J. Smith replied that some people did not like the wording in a letter sent out to each of the strikers (inferentially, the November 9 letter) or did not know where they stood with Respondent, so they went elsewhere; no entry resembling these remarks appears on Iltis' flip chart, whose sheets are undated except for one made at the November 29 meeting. When so questioned individually, Heil replied that he did not know. When thus individually questioned, all the returning strikers replied, but the record fails to show what the others said. Iltis recorded some of the responses, but not the speakers' names, on her flip chart. After that, Rex asked the group generally why they had returned to work. Nobody volunteered a reply. Then, Rex asked each returning striker individually why he or she had returned. When thus individually questioned, E. J. Smith replied that ''the Union made an offer, [Rex] had accepted it, and here [Smith] was.'' When thus individually questioned, Heil, who since November 7 had been participating in negotiations as a member of the employee negotiating committee, said that he needed the job.[63] Iltis put onto her flip chart six of the answers to these questions—''Length of service/Offer was made to return/Enjoyed working here/I like it/Don't want to start over/Retire soon.''[64] The record fails to show whether some of the returning strikers failed to answer this question by Rex. E. J. Smith gave honest testimony that he did not feel threatened by Rex's question about why Smith had returned.

As to the questioning/flip chart portion of the other meetings, the only testimony is that of Iltis and Rex, both of whom (as noted) testified generally about all of the meetings. A composite of their testimony shown as follows: Rex asked the group generally why so many good people had chosen to quit and not come back to work with Respondent after the strike. Nobody answered. Then, Rex put this question to each returning striker individually. If a particular striker failed to respond, Rex proceeded to the next striker. Then, Rex asked the group generally why they had not quit, but had chosen to return to their jobs. Nobody answered. Then, Rex put this question to each returning striker individually. If a particular striker failed to respond, Rex proceeded to the next striker. Iltis recorded some of the answers to both questions on her flip chart, but did not record the names of the speakers.

Iltis recorded on her flip chart many, but not all, of the answers to Rex's questioning. Her flip chart for three of these meetings contains the entries, in response to Rex's question about why other strikers had not returned, ''Disgust w/union leadership,'' ''Strike longer than anticipated,'' and ''Long strike.'' Her flip chart for meetings other than the December 5 meeting contains the entry, in response to Rex's question about the reason for the return of the striker addressed, ''Unhappy w/union leadership.'' However, most of the answers, at least as she recorded them, did not expressly

[62] In addition to Heil and E. J. Smith, the strikers who returned to work on that day were Ordille, R. Kreuson, Landis, Famularo, Cute, Frederick, Schoch, and Samuelson.

[63] Heil testified that Rex ''insisted on each of us to give an answer.'' Heil later testified that he used the word ''insisted'' because Rex ''pointed to each one and asked for an answer.''

[64] This finding is based on the fact that the entry ''offer was made to return'' is the only flip-chart entry which even arguably reflects Smith's reply. No dates appear on the flip-chart pages which were written during the various meetings at which returning strikers were asked the reason for their return.

mention the Union or the state of negotiations.[65] Rex and/or Iltis credibly testified that the responses included: they needed the job, it was too late to start over, they liked working for Respondent, wages and benefits were good, and they were close to retirement age and were looking out for their pension interest.

Rex concluded each of the striker orientation meetings by opening the floor for comments and questions. Not many were made. At one of the meetings, a returning striker asked whether there was still a union; Rex replied yes. A returning striker asked at one of the meetings whether there would be more negotiations; Rex replied that ''there would be at any time that a mediator called for a meeting . . . we would be there.'' A returning striker asked at one of the meetings, ''if since there was no union was the Company going to be deducting union dues.'' Rex replied that he was not sure, but without checking with someone who knew about such matters, Rex believed that dues would not be deducted unless there was a contract; however, Rex said, the employees were still represented by the Union. A returning striker asked at one of the meetings when his insurance would be effective; Iltis replied that the strikers' insurance would be reinstated on the day they returned to work.

J. *The Alleged Unilateral Changes*

Rex testified, in effect, that by the end of the Thanksgiving weekend, he had decided that upon the strikers' recall, Respondent would apply to their employment the terms of Respondent's proposal of November 7, 1988.[66] Iltis testified in August 1989 that when the striking employees came back to work, they were working under the terms of that proposal, and that they had been working under the terms of that proposal since November 29, 1988.

About November 29, 1988, Respondent took the following action consistent with its offer to the Union on November 7, 1988: established minimum wage rates; reduced the number of labor grades; changed job classifications and job descriptions; modified Respondent's job evaluation policy; changed wage rates of group leaders; instituted a sales bonus plan; changed wage hour guarantees; changed the overtime policy; changed the training period rate progression; changed the temporary transfer policy; changed the recall, layoff, and bumping policies; instituted the policy regarding the recall of striking employees; changed the seniority policy; changed the vacation replacement policy; and changed the holiday pay and vacation policy.[67] In addition, about November 29, Respondent instituted a merit wage increase policy in accordance with Respondent's November 7 proposal. Also, after the strike, and consistent with Respondent's November 7 proposal, Respondent abandoned the prior practice of paying pro rata vacation pay to employees who quit. Between the end of the strike and the first day of the hearing (August 16, 1989), about 17 employees quit. Among the employees who quit but did not receive pro rata vacation pay were Ann Antonacio, Edward Camburn, John Fillman, and Kenneth Smith.

The complaint alleges that Respondent ''changed its policy regarding the performance of unit work by non-Unit employees . . . on or about November 29, 1988.'' As discussed supra, part II,B, during the strike supervisors spent most of their time performing production work. After strikers returned to work, Respondent had supervisors perform unit work whenever it was needed and the supervisors had time to do it. As noted supra, part II,C,2, the 1985–1988 agreement contained significant limitations on the performance of unit work by supervisors.

The complaint alleges that about November 29, 1988, Respondent ''eliminated paid lunch breaks.'' Iltis testified that under the expired agreement, employees in production were on an 8-hour day, got paid for 8 hours, and ate as they could; whereas the quality and maintenance employees' day was extended by one-half-hour to provide them with a one-half hour unpaid lunch. Still according to Iltis, during the 1985 negotiations Respondent had told the Union that at some point in the future, when Respondent was able to provide physical lunchroom facilities, Respondent would institute an unpaid lunchbreak for everyone at the facility. As previously noted, Rex testified to stating, during the strike orientation meetings in late November and early December 1988, that lunchbreaks were different from what they had been before the strike. At that time, Respondent had set up in the induction room an area which Iltis testimonially described as a ''temporary lunchroom facility.'' Construction of a lunchroom began in December 1988 and was completed by the end of February 1989. Iltis testified in August 1989 that ''we have now instituted what we had told the Union we were going to which was a 20 minute unpaid lunch for everyone.'' In consequence, the quitting hour for all the unit employees on all three shifts was changed—as to the production employees, it was extended by 20 minutes; and as to the maintenance and quality control employees, it was shortened by 10 minutes. The 1985–1988 contract included a ''letter of intent,'' dated September 16, 1985, that, ''The Company intends to provide lunchroom facilities when all employees have an unpaid lunch.'' This ''letter of intent'' was included in Respondent's November 7, 1988 proposal, and there is no evidence that the lunchbreak/lunchroom matter was ever discussed during the 1988 negotiations.

Before the strike, janitors in the bargaining unit emptied the trash cans of production employees, and other firms' truckdrivers who made deliveries to Respondent's facility were not permitted to perform the work, which was reserved to unit employees, of loading and unloading other firms'

[65] The flip chart contains such entries as: long service; like it here; needed a job; like my job; willing to work with ''you''; desire to qualify for a pension; a desire to work part time after retirement; cannot go elsewhere; recognize good company; money; benefits; family commitments; difficult to start over; and do not want to start over. Cf. supra, fn. 64 and attached text.

[66] This finding is based upon his testimony that during this weekend, he prepared an outline of the remarks which he later made to the returning strikers (see supra, part II,I). This outline indicates that he intended to refer to the ''Merit Review Plan,'' the ''Sales Bonus Plan,'' and flexible job classifications, all of which were included in Respondent's November 7 proposal. As discussed supra, part II,I, he and Iltis advised the returning strikers on November 29 and thereafter that they would be returning under the terms of Respondent's last offer.

[67] My findings in this sentence are based on Iltis' testimony. Where she used the term ''consistent,'' Respondent's answer uses the words ''in accordance.''

trucks. When employees returned following the strike, Respondent began to require production employees to empty their own trash cans, and permitted other firms' truckdrivers to load and unload their trucks, without prior notice to or bargaining with the Union.

The complaint alleges that about November 29, 1988, Respondent changed its health insurance benefits and its pension plan. Iltis' testimonial denial of this allegation is uncontradicted.[68] In addition, the complaint alleges that about November 29, 1988, Respondent changed its policy regarding arbitration costs. On August 17, 1989, Iltis testified without contradiction, ''we have not changed the policy regarding arbitration costs. There have been no arbitrations.''

K. *The Union's January 19, 1989 Request for Continued Negotiations*

Between November 21, 1988, and January 19, 1989, nobody from Respondent contacted Pearson about resuming negotiations; nor did the Union contact Respondent for this purpose. In December, Kapner told Hoelscher that he had not heard from anyone and ''I don't know that anything is going to be gained at this point with the holiday.'' About January 2, 1989, Hoelscher telephoned Kapner and asked him what was going on. Kapner said that he had not heard anything; that during a discussion with Pearson about another case Kapner had asked him about the dispute with Respondent and Pearson had replied, ''no, it is in the hands of the lawyers.''[69] On January 19, 1989, Pearson mailed a letter to Rex, bearing that date, which read as follows:

> The Union is still waiting for the Company to continue negotiations. Due to the fact that we were not at an impasse when the Company broke off negotiations, I believe it would be in the best interest of both parties to negotiate as soon as possible and we are waiting to hear from you.[70]

By letter dated January 23, 1989, Iltis replied, ''We always have been and will continue to be ready to meet with you at the call of the Federal Mediator.'' A courtesy copy of this letter was sent to mediator Kapner. The parties resumed negotiations in March 1989. The last paragraph of Respondent's April 13, 1989 answer to the complaint states, ''Even if the parties were not at impasse on November 21, 1988, they will either have reached a new collective bargaining agreement or will be at impasse prior to the date scheduled for trial [July 17, 1989] in this action.'' As of August 16, 1989, the first day of the hearing, the parties had not reached an agreement.

L. *Recall of Strikers in 1989*

Eight of the strikers alleged to be discriminatees were not recalled until March or April 1989.

Roeder, who before the strike had been a heat treater A—group 1 at $11.47 an hour, was recalled to work as a utility worker at $8.97 an hour, effective March 1, 1989, and quit on March 21, 1989. Audain and Pierre, who before the strike had been heat treaters B—group 2 at $9.81 an hour, were recalled to work as utility workers at $8.97 an hour effective April 10 and 17, 1989, respectively. Kaminski, who before the strike had been an induction and flame hardener at $10.15 an hour, was recalled to work as a utility worker at $8.97 an hour effective April 19, 1989, and quit that same day. Respondent offered to recall Gerhart effective April 3, 1989, but he did not return owing to physical disability.

Before the strike, Respondent had employed one inspector on each of the first two shifts and two inspectors on the third shift—a total of four inspectors.[71] Immediately following the strike, Respondent employed one inspector on each shift. In late January 1989, after third-shift inspector Antonacio quit, second-shift inspector Denton was transferred to the third shift. After Denton's transfer, she regularly came in early and worked the last 2 hours of the second shift as well as the entire third shift, and first-shift inspector Lopez began to regularly stay late and work the last 2 hours of the second shift. During the 4 hours of the second shift when no inspector was present, nonunit quality control employees performed some inspection work. Michie, who just before the strike had been an inspector at $9.98 an hour, was recalled as a utility worker at $8.97 an hour effective April 3, 1989, and quit that same day. Just before the strike, B. Hendricks had been a shipper-receiver at $9.64 an hour; he was recalled as a ''heat treat'' at $8.97 an hour effective April 19, 1989. Just before the strike, L. Hendricks had been a shipper-receiver at $9.64 an hour; he was recalled as a material handler at $9.64 an hour effective April 24, 1989. Both B. Hendricks and L. Hendricks had been inspectors during part of their tour of duty with Respondent. When inspector Antonacio quit in late January 1989, she was receiving $10 an hour.

For reasons indicated supra, part II,H, I have made no effort to ascertain whether these recalled strikers were recalled to the same jobs or shifts they occupied before the strike. None of the strikers recalled in 1989 was paid at any minimum rate included in Respondent's November 7, 1988 proposal.

Iltis testified that L. Hendricks, Kaminski, B. Hendricks, Pierre, and Audain were recalled at a relatively late date because they had poor work records.

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[68] The attachment to Rex's November 9 letter to all the unit employees included, in its summary of Respondent's November 7 proposed changes, the statement, ''An amendment to the Pension Plan has been prepared to allow employees who terminated their employment relationship with the Company to receive the amount of their accrued benefit sooner than previously permitted.'' It is unclear whether Iltis' remarks to the returning strikers referred to this matter.

[69] This finding is based upon Hoelscher's testimony, which on timely objection was not received to show the truth of Kapner's representation.

[70] Hoelscher testified that on January 23, Kapner (to whom Pearson had sent a courtesy copy of the January 19 letter) told Hoelscher that Kapner had telephoned Pearson and asked why he had not telephoned Kapner about having a meeting, to which Pearson replied that he had written the letter because the lawyers told him to. On timely objection, Hoelscher's testimony in this report was not received to show that Pearson made the remarks attributed to him. Pearson credibly denied consulting counsel about the letter or so advising Kapner. Accordingly, and for demeanor reasons, I do not accept Hoelscher's testimony about this conversation between him and Kapner, who did not testify.

[71] As used in the text, the job classification ''inspector'' refers to the job with that title after the strike and with the prestrike title ''Final Inspector (Inspector A).'' The prestrike job classification ''Inspector B'' was encompassed in the poststrike job classification ''Utility Worker.''

M. *Analysis and Conclusions*

1. Respondent's alleged violations of Section 8(a)(5) and (1) of the Act

a. *Respondent's alleged failure to bargain in good faith on and after November 7, 1988*

Section 8(d) of the Act defines the duty to bargain collectively as the duty to ''confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession.'' Accordingly, although the duty to bargain does not compel a party to make concessions, discharge of that duty does require a willingness by each party to hear, deliberate, and consider changing its mind; and to search for a common ground. Moreover, although the duty to bargain presupposes a desire to reach ultimate agreement, that duty is not satisfied by a mere willingness by one party to enter into a contract of its own composition.[72]

On the basis of these principles, I agree with the General Counsel that Respondent failed to bargain in good faith on and after November 7, 1988, in that Respondent evinced an unwillingness to consider any meaningful suggestions by the Union in connection with Respondent's proposal that day, and entertained a fixed intent to put that entire proposal into effect whether or not the Union agreed to it. In so finding, I rely largely on Respondent's conduct during and after the November 14 bargaining session, the only such session between Respondent's presentation of that proposal to the Union and Respondent's action in largely implementing it. Respondent's witnesses testified, in effect, that a principal purpose of Respondent's new proposals on November 7 was a desire to continue operating the plant with the increased flexibility which was being exercised during the strike, when any individual could be assigned to perform any job required, and to provide employees with an incentive to generate increased sales. During the less than 2 hours of the November 14 session, the Union accepted Respondent's proposal for no wage increase and for a sales bonus plan which gave employees an incentive to increase their productivity; changed from outright rejection to outright acceptance of Respondent's proposal for more than a 75-percent reduction in the number of labor grades; and, instead of adhering to the Union's initial outright rejection of Respondent's proposal for merit increases ''at its sole discretion'' (a proposal shown by Respondent's subsequent remarks as also encompassing decreases to amounts at or above the contractual minimum), accepted that proposal subject to the grievance procedure. Furthermore, during that meeting the Union did not object at all to Respondent's proposed expansion of the management-rights clause so as to include, among other things, the right to assign to jobs and to transfer employees; or to a number of other company proposals some of which significantly enlarged Respondent's freedom to transfer employees between jobs (see supra, part II,E). Nor did the Union reject (although it did request explanations of) Respondent's proposals which permitted Respondent to use temporary employees when permanent employees were on vacation; and afforded Respondent the right unilaterally to put into effect (subject to a grievance alleging that ''the job is improperly rated'') new job descriptions and wage rates. If included in a complete and binding contract, the proposals which the Union rather quickly agreed to would constitute an appreciable contribution toward Respondent's goals of increased labor incentives and flexibility, and considerable further assistance would be provided by inclusion of the proposals for which the Union merely requested further explanation or about which the Union did not comment at all. At the hearing, Respondent and Pearson both took the position that Pearson's failure to object to some of Respondent's November 7 proposals meant that he would have accepted them.[73] Nonetheless, Hoelscher by his own admission concluded that the Union had not addressed ''any'' of Respondent's problems or goals. Indeed, by his own admission, he included in the Union's complained of conduct the Union's failure to agree to give Respondent the right to use part-time employees; even though Respondent had told the Union that Respondent was merely considering a company proposal on this subject, Respondent never gave the Union a written proposal with respect thereto (although Respondent indicated otherwise in the summary sent to the employees on November 9),[74] and the Union (so far as the record shows) had never commented on this subject at all.

Respondent's fixed determination to put into effect the terms, and only the terms, in its own contractual proposal is further shown by Company President Rex's November 9 letter to all employees in which Rex described Respondent's November 7 proposal as Respondent's ''final offer . . . last and final offer . . . final contract'' which Respondent was urging the employees to ratify; this letter was sent to all unit employees 2 days after Respondent gave the Union Respondent's November 7 proposal, and before the Union had had an opportunity to even review it carefully, let alone to acquaint Respondent with a careful and specific response. Respondent's indifference to any union suggestions with respect to Respondent's November 7 proposal is further shown by Hoelscher's statement, before presenting the Union with the November 7 proposal, that this was Respondent's ''last, best and final'' proposal; by Hoelscher's reiteration at the November 14 meeting that the November 7 proposal was Respondent's last and best offer; by his statement at that meeting that this proposal ''is the contract''; and by his statement

[72] *NLRB v. Insurance Agents (Prudential Insurance Co.)*, 361 U.S. 477, 486–488 (1960); *Marriott In-Flite Services*, 258 NLRB 755, 764 (1981), enfd. 729 F.2d 144 (2d Cir. 1983), cert. denied 464 U.S. 829 (1983); *Hotel Roanoke*, 293 NLRB 182 (1989); *J. P. Stevens & Co.*, 239 NLRB 738, 749 (1978), enfd. in relevant part 623 F.2d 322 (4th Cir. 1980), cert. denied 449 U.S. 1077 (1981).

[73] As to Respondent's proposal permitting use of temporary employees during vacations, on Respondent's cross-examination Pearson testified as follows:

> Q. But apparently you didn't flag that [on Pearson's notes in preparation for the November 14 negotiating session] as . . . an objectionable paragraph?
>
> A. No.
>
> Q. Okay, so you would have accepted that. You had accepted that in effect.
>
> JUDGE SHERMAN: The witness nodded his head yes.

[74] ''The contract includes provisions permitting the Company to hire . . . part-time employees desirous of working a regular schedule of less than the normal 8-hour day. These employees would be required to join the Union and pay Union dues just as all other employees.''

on November 7, immediately after apprising the Union for the first time of numerous proposals which included a proposal for supervisory performance of unit work, that even if the strikers came back, ''the supervisory personnel that was in there would still be working.'' Further evidence of Respondent's determination to effectuate its own proposal without even considering the Union's views is Respondent's November 29 action in unilaterally at least purporting to effectuate Respondent's November 7 proposal, after disregarding the Union's November 16 and 21 requests for resumption of negotiations, and in the absence of an impasse (see infra, part II,M,1,c). Indeed, immediately upon being advised at the beginning of the November 14 session that the Union could not live with some of the things in Respondent's proposal, Hoelscher said, in effect, that he would give a ''quick no'' to any substantive union proposals. Further evincing Respondent's indifference to any proposals advanced by the Union is Respondent's failure to ask Pearson to clarify or to repeat, in order to enable Respondent to know what they were, certain comments, which Respondent's representatives believed self-contradictory or could not hear, about Respondent's November 7 proposal. Additionally indicating Respondent's bad-faith motivation is Rex's reference, when urging the employees to ''ratify . . . this final contract,'' to Respondent's ''competitors, mostly all non-union, [who] have higher sales productivity and less labor costs than we have, and . . . do not endure the countless hours of nonproductive grievance meetings and work slowdowns over frivolous issues that we have endured.'' A unionized employer's envy of nonunion competitors is not unlikely to infect his bargaining with the union.

Accordingly, I find that Respondent bargained with the Union in bad faith on and after November 7, 1988, in violation of Section 8(a)(5) and (1) of the Act.

b. *Respondent's alleged failure to honor the Union's alleged requests for continued negotiations*

The credited evidence shows that Respondent disregarded the Union's November 16 and 21, 1988, requests for resumption of negotiations, and did not express until January 23, 1989, any willingness to accede thereto. Respondent's sole tendered defense to its action appears to be the contention that this request was directed to it by Union Business Agent Pearson, and not by the Federal mediator, through whom the parties had scheduled bargaining negotiations for an undisclosed period which began no later than early October 1988. I find any such defense to be without merit, particularly because not until late January 1989, more than 2 months after Pearson's November 1988 fruitless requests for continued negotiations, did Respondent indicate to him a willingness to honor such requests if made through a mediator. See *Kansas Van & Storage Co*., 273 NLRB 855, 863 (1984).

c. *Respondent's alleged unilateral changes*

The undisputed evidence shows that about November 29, 1988, Respondent effected in employees' working conditions certain unilateral changes which were consistent with Respondent's November 7 proposal. Respondent contends that this action was not unlawful because as of that time, the parties had reached a bargaining impasse. However, ''it is manifest that there can be no legally cognizable impasse, i.e., a deadlock in negotiations which justifies unilateral action, if a cause of the deadlock is the failure of one of the parties to bargain in good faith.'' *Shipbuilders (Bethlehem Steel Co.) v. NLRB*, 320 F.2d 615, 621 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964). Accord: *PRC Recording Co*., 280 NLRB 615, 634 (1986), enfd. 836 F.2d 289 (4th Cir. 1987); *Park Inn Home for Adults*, 293 NLRB 1082, 1087 fn. 9 (1989). Accordingly, rejection of Respondent's impasse defense is required by my finding that before making these unilateral changes, Respondent had engaged in bad-faith bargaining which demonstrated Respondent's total indifference to the Union's views regarding the proposals which Respondent unilaterally implemented.

Furthermore, even assuming that Respondent had bargained in good faith before unilaterally implementing a substantial part of Respondent's November 7 proposal, Respondent's action violated Section 8(a)(5) and (1) because no bargaining impasse existed. As to the existence of an impasse which justifies unilateral implementation of pending proposals, ''The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues to which there is disagreement, the contemporaneous understanding of the parties as to the state of the negotiations are all relevant factors to be considered . . . .'' *Taft Broadcasting Co*., 163 NLRB 475, 478 (1967), affd. 395 F.2d 622 (D.C. Cir. 1968). In the instant case, almost all the issues which divided the parties as of the end of the November 14 bargaining session had been created by Respondent's proposals of November 7, only a week earlier. Almost the entire November 7 bargaining session had been devoted to Respondent's oral presentation and explanation of these proposals. During the 90-minute November 14 bargaining session, the Union accepted Respondent's proposal of no wage increase plus a sales bonus plan which would provide employees with an incentive to improve productivity; accepted Respondent's proposed job grouping; accepted Respondent's proposed merit review program if it were rendered grievable; tacitly accepted (by interposing no objections to) a number of Respondent's other new proposals, which (inter alia) significantly expanded Respondent's freedom to assign and transfer employees; and—by asking questions—suggested possible willingness to agree to Respondent's proposed clauses regarding use of temporary employees for vacations and regarding job evaluation. Furthermore, Respondent's representatives admittedly could not understand Pearson's November 14 position with respect to double time, or hear his November 14 comments with respect to Respondent's proposal regarding shift scheduling. Moreover, owing to Respondent's unlawful action in disregarding the Union's November 16 and 21 requests for the resumption of bargaining negotiations, the parties did not meet at all between November 14 and Respondent's implementation action on November 29, more than 2 weeks later. Also, the Union had abandoned a number of its proposals, and agreed to a number of Respondent's proposals, during the pre-November negotiations; and the parties had previously been parties to a series of bargaining agreements during a 40-year bargaining history which encompassed a single pre-1988 strike, in 1961.

In contending the existence of an impasse as of November 29, Respondent heavily relies on the Union's bargaining posture with respect to the loser-pays-all and checkoff issues. The credible evidence shows merely that Pearson's superiors

had instructed him that he ''probably . . . shouldn't agree to [Respondent's proposals as to these matters] if [Pearson] could get around negotiating the contract without.'' Furthermore, Pearson had twice submitted to the union membership (without recommendation one way or the other), for acceptance or rejection, contracts proposed by Respondent both of which included Respondent's proposal with respect to loser-pays-all and at least one of which also included Respondent's proposal as to checkoff. Iltis, as well as Pearson, testified that these proposed contracts would have bound the Union if approved by the membership, who rejected the September 16 proposal for reasons undisclosed by the record, and rejected the November 7 proposal for reasons of ''an insurance plan and money.'' Moreover, as previously noted, as to the checkoff issue Hoelscher himself testified that it was ''a mechanical one [which] we always felt we could in fact resolve,'' and to an agreement that Respondent's ''computer guy'' would call up someone in an appropriate union staff position to try to work out a method for making the deduction. Furthermore, Hoelscher testified that the sign-off sheets which he and Iltis prepared on October 4, 1988, and which included the ''loser-pays-all'' clause and a clause stating that ''The method of deducting Union Dues beginning February 1989 will be mutually agreed upon by the parties,'' set forth agreements which the parties had in fact reached. Hoelscher's testimony in this respect belies his further testimony that at the meetings after the first bargaining session ''other than the one time on September I think September 1st sticks in my mind [Pearson] said no at this point. After that it became absolute no.''[75] Under these circumstances, Respondent can hardly claim a belief as of November 29 that the Union would never have agreed to a contract which included Respondent's proposals as to loser-pays-all and checkoff. Indeed, and even laying to one side the fact that opposition to such company proposals had never been evinced by the union membership who possessed ultimate control over whether to accept any proposed contract which Respondent characterized as final, the Union's bargaining representatives might have accepted Respondent's positions as to loser-pays-all and checkoff if further negotiations had progressed toward an agreement with respect to the other issues (directed to wage scales, job assignments, length of work day, shift hours, required overtime, and preservation of unit work) which had been created by Respondent's November 7 proposal, and as to which the Union made significant concessions on November 14. In view of the significance to the employment relationship of such newly created issues, which dominated the November 14 negotiations, it cannot be said that the parties' November 14 disagreement about loser-pays-all and checkoff crippled the prospects of any agreement even if Respondent had acceded to the Union's requests for further negotiations.

[75] Nor do I credit Hoelscher's testimony that, in effect, he attributed solely to the Union's objections to loser-pays-all Pearson's October 4 conduct in losing his temper and threatening to walk out of the meeting. Rather, Hoelscher must have suspected that Pearson's conduct was due at least partly to Respondent's conduct in consuming almost 2-1/2 hours to draft sign-off sheets which Respondent had undertaken to complete in 20 minutes, and then presenting a gratuitously drafted sign-off sheet calling for a clause (loser-pays-all) which Pearson had twice rejected earlier that day.

Respondent's brief points to Hoelscher's testimony that at the conclusion of the November 14 meeting, he believed the parties to be ''hopelessly deadlocked'' not only because of the loser-pays-all issue, but also because of ''the issue of performance evaluation, temporary transfers, temporary employees all these which seemed to be no alternate proposal from the Union.''[76] However, as previously noted, on November 14, the Union had agreed to Respondent's performance-evaluation proposal if the evaluation were made grievable; had tacitly accepted Respondent's proposed enlargement of its rights under the management-rights clause and much of Respondent's proposal regarding temporary transfers; and had merely asked questions (rather than rejecting or tendering a counter proposal) about Respondent's proposal that temporary employees could be used during vacations and for a new job evaluation clause (and see supra, fn. 73). Accordingly, even if Hoelscher and Iltis (both experienced negotiators) had nonetheless honestly concluded that the parties were deadlocked as to the issues specified by Hoelscher, any such conclusion would be so contrary to the facts as to furnish no support to Respondent's impasse contention. Although Respondent also relies on the parties' failure to agree about funeral leave, on November 14 the Union expressed disagreement with only Respondent's failure to include stepchildren, to whose inclusion Respondent had agreed by October 4 but had withdrawn agreement on November 7.

In short, I conclude that even assuming Respondent had been bargaining in good faith at all material times, as of November 29, 1988, the parties had not exhausted the prospects of reaching an agreement and that, therefore, no valid impasse existed. Further, I find that Respondent ''had a fixed determination to implement [its proposals] regardless of the status of its negotiations with [the Union] and without [the Union's] consent'' (*Howard Electrical & Mechanical*, 293 NLRB 472 (1989)). Hence, the status of negotiations did not privilege Respondent to effectuate its own proposals (even those the Union had tentatively agreed to) on November 29, 1988. *Saunders House v. NLRB*, 719 F.2d 683 (3d Cir. 1983); *Microdot, Inc.*, 288 NLRB 1015, 1016 (1988); *Harrah's Marina Hotel & Casino*, 296 NLRB 1116 (1989); *Bottom Line Enterprises*, 302 NLRB 373 (1991); see also *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543–544 fns. 5 and 6 (1988); cf. *Steego Transportation Equipment Centers v. NLRB*, 910 F.2d 268, 273 (5th Cir. 1990), the Board's petition for certiorari granted, April 29, 1991, No. 90–1165.

Accordingly, I find that Respondent violated Section 8(a)(5) and (1) of the Act on November 29, 1988, by unilaterally taking the following action reasonably comprehended within Respondent's November 7, 1988 proposal: establishing minimum wage rates; reducing the number of labor grades; changing job classifications and job descriptions; modifying its job evaluation policy; changing wage rates of group leaders; instituting a sales bonus plan; changing wage hour guarantees; changing the overtime policy; changing the

[76] Rather similarly, Iltis testified that as of November 14 she concluded that the parties were never going to reach an agreement, because of the loser-pays-all issue and ''because Mr. Pearson reverted back to a lot of the language of the expired agreement which we had made clear to him was totally unacceptable.'' As to the extent of Pearson's proposed reversion, see supra, part II,E.

training period rate progression; changing the temporary transfer policy; changing the recall, layoff, and bumping policies; instituting the policy regarding the recall of striking employees;[77] changing the seniority policy; changing the vacation replacement policy; changing the holiday pay and vacation policy; instituting a merit increase policy; and abandoning the prior practice of paying pro rata vacation pay to employees who quit. Similarly, Respondent violated Section 8(a)(5) and (1) by imposing the new requirement that bargaining unit production employees (rather than bargaining unit janitors) empty such production employees' trash cans, even assuming that such a new requirement was consistent with Respondent's proposed new job classifications.

For the same reasons, I agree with the General Counsel that Respondent violated Section 8(a)(5) and (1) by its action on and after November 29, 1988, in connection with performance of unit work by supervisors. Before the strike began, supervisors performed unit work only under very limited circumstances. As Respondent does not dispute, the performance of unit work by supervisors is a mandatory subject of collective bargaining. *Maintenance Service Corp*., 275 NLRB 1422, 1427 (1975). Because until November 7, 1988, Respondent did not even propose a change in the provisions of the 1985–1988 agreement which imposed such limitations, Respondent's action in having unit work freely performed by supervisors after the expiration of the agreement was permitted by Section 8(a)(5) solely because this action was a means by which Respondent continued operations during the strike (which began upon the September 17 expiration of the agreement) and, absent impasse, did not privilege Respondent to continue this practice after the strike had ended in November. See *American Cyanamid Co. v. NLRB*, 592 F.2d 356, 360–361 (7th Cir. 1979); *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1088 (1st Cir. 1981); *Land Air Delivery*, 286 NLRB 1131 (1987), enfd. 862 F.2d 354 (D.C. Cir. 1988), cert. denied 110 S.Ct. 52 (1989); *Alexander Linn Hospital*, 244 NLRB 387 (1979), enfd. 624 F.2d 1090 (3d Cir. 1980).[78]

In addition, I find that Respondent violated Section 8(a)(5) and (1) by its unilateral action in permitting the unit work of loading and unloading trucks to be performed, after the end of the strike, by truck drivers who were not in Respondent's employ. Respondent has not referred me to any contract proposal by it, nor am I aware of any, which expanded any right by Respondent to assign unit work to persons not on Respondent's payroll. Accordingly, such action was not reasonably contemplated within Respondent's November 7 proposal, and violated the Act regardless of whether contract negotiations had reached a legally cognizable impasse. *American Gypsum Co*., 285 NLRB 100, 101 (1987). For the reasons indicated in connection with Respondent's unilateral action regarding supervisors' performance of unit work, the fact that Respondent permitted outside truckdrivers to perform such loading and unloading work during the strike did not privilege Respondent to continue after the end of the strike this assignment of unit work which had been limited to unit employees before the strike began.

However, the General Counsel has failed to show that Respondent acted unlawfully with respect to the elimination of paid lunch breaks. To be sure, Respondent may be hypertechnical in contending that it never had paid lunchbreaks; prior to the strike, production employees were permitted to eat their lunch during hours for which they were being paid. However, the 1985–1988 contract provided, in effect, for an unpaid lunch when ''lunchroom facilities'' were provided; Respondent's November 7 proposals included such a provision; and the record fails to show that the ''temporary area'' set up in the induction room when the strikers returned to work did not constitute ''lunchroom facilities'' within the meaning of the 1985–1988 contract and the November 7 proposal. I conclude that the General Counsel has failed to show unlawful unilateral action with respect to the production employees' lunchbreak. See *Concrete Pipe Corp*., 238 NLRB 495 (1978).[79]

In addition, the undisputed evidence refutes the complaint allegations that Respondent changed its health insurance benefits, its pension plan, and arbitration costs. As to these allegations, the complaint will be dismissed.

2. Respondent's alleged violations of Section 8(a)(1) and (3) of the Act

Economic strikers who make an unconditional offer to return to work are entitled to an offer of immediate reinstatement to their former or substantially equivalent positions unless the employer can show that they have been permanently replaced or that his action was due to some other legitimate and substantial business justification. *NLRB v. Fleetwood Trailer Co*., 389 U.S. 375, 378–379 (1967); *NLRB v. W. C. McQuaide, Inc*., 552 F.2d 519, 528 (3d Cir. 1977); *Harvey Engineering Corp*., 270 NLRB 1290, 1292 (1984). It is undisputed that on Wednesday, November 16, 1988, an unconditional offer to return was made by the Union on behalf of all the strikers named in the complaint (see *McQuaide*, supra, 552 F.2d at 529), and that the offers of reinstatement made to them were not effective until various dates between Tuesday, November 29, 1988, and April 24, 1989.

Initially, Respondent contends that the application for reinstatement did not become effective until Monday, November 21, 1988, when the picketing was permanently terminated. The continuation of the picketing did not, of course, invalidate the application. *McQuaide*, supra, 552 F.2d at 529. However, Respondent appears to rely on Iltis' testimony that the continuation of the picketing until the afternoon of Monday, November 21, confused her ''Because I felt that if they were offering to return to work, they should not still be picketing the plant. So, I did not know if [Pearson's] offer was sincere.'' However, the honesty of Iltis' testimony in this respect is cast into serious question by her remarks to Pearson on November 18, when he first advised her that the pickets had been removed, that Respondent had already attempted (although unsuccessfully) to cancel all the help-wanted advertisements for replacement workers; and by her November 21 remarks to him, immediately after his second application for reinstatement, that Respondent was already ''working on

[77] I need not and do not consider whether a legally cognizable impasse would have permitted unilateral implementation of this recall proposal.

[78] Although the cited cases involve subcontracting of unit work rather than its performance by supervisors, I agree with the General Counsel that the two situations are indistinguishable for purposes of this analysis.

[79] The complaint does not allege any violation in connection with the length of the lunchbreak.

it.'' Moreover, Rex testified (as did she, in effect) that the picketing was still in progress when management began to formulate its plans about whom to reinstate to what job. Furthermore, there is no evidence that Respondent ever told Pearson (either before the initial, November 18 removal of the pickets or at any other time) that the continued picketing had created any doubt as to the meaning or sincerity of the November 16 offer to return. Although Respondent points to Pearson's November 21 remarks to Iltis that he had ''screwed up'' by putting the pickets back on November 18, this remark could not have affected Respondent's prior conduct and, moreover, may have referred (for example) to creating perceived unwarranted embarrassment to Respondent, or unnecessary trouble and expense for the pickets and/or the Union, rather than creating, as to the Union's November 16 offer, ambiguities which Respondent never alleged to him. Furthermore, Pearson's November 18 complaint to Iltis about the help-wanted advertisements for replacement workers lent credence to the sincerity of his November 16 application. Under these circumstances, I find that the unconditional application for reinstatement was effective on Wednesday, November 16. See *Dold Foods*, 289 NLRB 1323, 1332–1333 (1988).

The General Counsel contends, in effect, that as to strikers who had not been permanently replaced, Respondent was required to offer reinstatement effective on or before 5 days following the effective date of the application for reinstatement—that is, reinstatement effective on or before Monday, November 21. In so contending, the General Counsel relies on *Drug Package Co*., 228 NLRB 108, 113–114 (1977).[80] Respondent contends that *Drug Package* is inapposite here because that order involved what the Board found to be an unfair labor practice strike, whereas the General Counsel makes no contention here that the strike was other than an economic strike.[81] The General Counsel engages in some oversimplification in urging that ''there is no reason why unreplaced economic strikers should be forced to wait longer for reinstatement than unfair labor practice strikers'' (Br. 58). Thus, the Board's *Drug Package* ruling represented

> the appropriate balance between the administrative problems faced by the employer, the right of the strikers to reinstatement upon request, and the interests of the lawfully hired replacements who must be terminated to permit return of the strikers. Thus, the unfair labor practice strikers have voluntarily left their jobs, albeit in protest of their employer's unfair labor practices, and the time when they apply for reinstatement is solely within their own control. On the other hand, the employer and the replacements, if any, have no such control . . . .

This language from *Drug Package* at least arguably indicates that determining the date by which an employer is obligated to honor the reinstatement applications of economic strikers who have not been permanently replaced would require an appropriate balance between the rights of economic strikers who left their jobs without any unlawful employer provocation, and replacements (if any) who never had any reason to believe that their job claims were superior or even equal to the claims of returning strikers; the instant case is somewhat atypical in that the employer did engage in unfair labor practices during the strike, although they are not alleged to have converted it into an unfair labor practice strike, and most of the striker replacements were admittedly temporary. However, after *Drug Package* a plurality of the Board rejected its then rule (not involved in *Drug Package*) that reinstatement rights of unfair labor practice strikers who have engaged in strike misconduct are to be determined by balancing the gravity of their misconduct against the severity of the employer's unfair labor practices which have provoked the strike. *Clear Pine Mouldings*, 268 NLRB 1044, 1045–1047 (1984), enfd. 765 F.2d 148 (9th Cir. 1985); cf. *Mohawk Liqueur Co*., 300 NLRB 1075 fn. 3 (1990). The plurality's approach would point to the conclusion that innocent economic strikers' right to reinstatement on application, although subject to some delay because of the employer's administrative problems and the replacements' interests, is not subject to further delay because the employer and the replacements are innocent as well. Moreover, the Board has said that the reinstatement rights of unreplaced economic strikers are the same as those of unfair labor practice strikers;[82] and, as to economic strikers whose reinstatement was unlawfully delayed, has ordered backpay beginning as of the unconditional offer to return to work and without any grace period—precisely the result called for by *Drug Package* with respect to unfair labor practice strikers. *Associated Grocers*, 253 NLRB 31, 34 (1980), enfd. 672 F.2d 897 (D.C. Cir. 1981), cert. denied 459 U.S. 825 (1982); cf. *Tall Pines Inn*, 268 NLRB 1392, 1392 fn. 3, 1413 (1984).

For the foregoing reasons, I conclude that the *Drug Package* rule applies to unreplaced economic strikers as well as to unfair labor practice strikers. Respondent admits, in effect, that as of November 16, 1988, an opening was available for each of the 34 alleged discriminatees who were recalled effective on or before December 8, 1988 (see R. Br. 51). However, the effective dates of these strikers' recall was no earlier than November 29, 1988,—at least 13 days after their offer to return. Accordingly, I find at this point that Respondent violated Section 8(a)(1) and (3) of the Act by delaying the reinstatement of the 34 strikers listed in Conclu-

[80] Enfd. in part, set aside in part, and remanded in part 570 F.2d 1340 (8th Cir. 1978), decision on remand, 241 NLRB 330 (1979).

[81] In *Drug Package*, the Board applied the 5-day rule in its decision on remand from the court of appeals, which had found the strike to be an economic strike only. 241 NLRB at 332, particularly fn. 13. However, certain peculiarities in that case militate against regarding it as clear precedent in connection with the instant case.

[82] See *Anaheim Plastics*, 299 NLRB 79 fn. 3 (1990), see also *Wilkinson Mfg. Co. v. NLRB*, 456 F.2d 298, 305 (8th Cir. 1972); *W. C. McQuaide, Inc*., 220 NLRB 593, 610 (1975), enfd. in part and remanded in part 552 F.2d 519 (3d Cir. 1977), decision on remand 237 NLRB 177 (1978), 239 NLRB 671 (1978), enfd. 617 F.2d 349 (3d Cir. 1980). In *Anaheim*, the Board found that as to certain strikers, whose status as economic or unfair labor practice strikers the Board found unnecessary to resolve, the employer did not violate the Act by delaying their reinstatement for 2 weeks, partly because a tornado on the day before the application for reinstatement had rendered production machines temporarily inoperative, had left the plant full of standing rainwater, and had created a danger of injury from electrical malfunctioning. In the instant case, Respondent relies on at least alleged administrative problems only, and not on any physical damage to the plant.

sion of Law 6, infra, who were recalled in 1988 effective November 29, 1988, and thereafter.

My conclusion that this case is controlled by *Drug Package* requires rejection of Respondent's contention that as to these strikers it did not violate the Act because Respondent allegedly acted reasonably in connection with reinstating them effective on various dates between Tuesday, November 29, and Thursday, December 8. In any event, the record fails to support this contention. Thus, of the 10 or 12 temporary employees whom Respondent had hired during the strike, the full-time employees continued to work until December 2, and the part-time employees continued to work until November 29 or 30. During this same period, Respondent's nonunit, clerical employees also performed unit work.[83] Moreover, Iltis' Tuesday, November 22 conversation with Pearson shows that by late afternoon on that day, Respondent knew the identity of the first ''group of people'' Respondent would be ''bringing back'';[84] the failure of her records to show any contact with any of the discriminatees between Thursday, November 24, and Sunday, November 27, inclusive, shows that by the end of Wednesday, November 23, Respondent knew exactly whom it would offer on November 28 to recall to work; and on November 28 the temporary replacements were still working for Respondent. Indeed, as noted, Respondent's opening brief states, in effect, that Iltis knew by late afternoon on Tuesday, November 22, which employees Respondent would initially recall. Nevertheless, until November 28 Respondent did not even give a recall date to any of the discriminatees, and as to some of them, the recall dates then specified were as long as a week later. In short, Respondent scarcely exerted itself in arranging for the recall of the strikers for whom openings are not even claimed to have been unavailable. An allegedly mitigating consideration relied on in Respondent's reply brief (p. 17)—namely, a desire to provide each returning striker with ''an orientation meeting to ease the transition''—in fact aggravates the seriousness of Respondent's delay; Respondent used these orientation meetings to announce that the returning strikers would be subject to Respondent's unlawful unilateral changes in important conditions of employment and to unlawfully interrogate the returning strikers about protected activity (see infra, part II,M,3).

As to the strikers not recalled until 1989, Respondent contends that its delay in recalling them was justified because, allegedly, no openings were available for them between the date of their November 16, 1988 offer to return and the dates of their recall. The burden of so showing is, of course, on Respondent. *Fleetwood*, supra, 389 U.S. at 378 fn. 4; *NLRB v. W. C. McQuaide, Inc*., 617 F.2d 349, 354 (3d Cir. 1980); *Consolidated Dress Carriers*, 259 NLRB 627, 638 (1981), enfd. in relevant part 693 F.2d 277 (2d Cir. 1982). Respondent has failed to discharge that burden.

Respondent principally argues that during the strike, bargaining unit work had been performed by Respondent's supervisors, and that the at least perceived success of this arrangement led Respondent to ''a fundamental, entrepreneurial decision to have its supervisors continue to perform 'hands on' work in the plant so that the supervisors could continue to experiment with each production job to ensure that each customer's unique heat treating requirements were satisfied'' (opening Br. 51). Respondent relies on *Pillows of California*, 207 NLRB 369 (1973); (during strike, strikers' duties divided among permanent replacements and supervisors); *Lincoln Hills Nursing Home*, 257 NLRB 1145, 1157–1158 (1981) (striking nurses' jobs eliminated during strike by conversion of employer's nursing home from ''skilled'' to ''intermediate care'' facility); *Overhead Door Corp*., 261 NLRB 657, 664–665 (1982) (strikers' production jobs filled during strike by transferring employees hired as permanent employees during strike for jobs discontinued during strike); *Atlas Metal Parts Co. v. NLRB*, 660 F.2d 304, 310 (7th Cir. 1981) (need for striker's prestrike job eliminated by acquisition of machine during strike). However, in none of these cases did the employer commit an independent violation of Section 8(a)(5) by continuing after the strike the practice found to justify the refusal to reinstate. Because Respondent violated Section 8(a)(5) by continuing to use supervisors for unit work after the end of the strike (see supra, part II,M,1), their use for this purpose cannot justify Respondent's failure to recall strikers. *Land Air Delivery v. NLRB*, 862 F.2d 354, 360 fn. 8 (D.C. Cir. 1988), cert. denied 110 S.Ct. 52 (1989), enfg. 286 NLRB 1131, 1132 (1987).[85] Moreover, because the alleged lack of supervisory work for supervisors (two of whom were hired during the strike) after the end of the strike would not constitute a defense to giving them unit work under circumstances where such action would otherwise constitute a violation of Section 8(a)(5), neither does such alleged lack of supervisory work constitute a defense to assigning unit work to supervisors rather than reinstating strikers to do it.

Respondent further contends that the amount of unit work in the plant was less after the strike than before and, in effect, that in consequence jobs would have been unavailable in November 1988, for the strikers not recalled until 1989, even if Respondent had discharged its duty of adhering after the strike to the prestrike, contractually generated practice of permitting supervisors to perform unit work under limited circumstances only. I find that Respondent has failed to dis-

[83] In addition, management and supervisory employees performed unit work during this period and thereafter; the significance of this is discussed infra. During the strike, management, supervisors, clerical employees, and full-time temporary employees worked 12-hour shifts. The record fails to show the length of their shifts between November 16 and December 2.

[84] Of the 34 discriminatees recalled effective December 8 or earlier, Iltis attempted to contact 10 on November 22 (Reynolds, Copenhauer, Antonacio, Leotta, Vallejo, Waldspurger, Homan, Bennett, Carreras, Clarke), but on that date she reached only 6 (Reynolds, Antonacio, Leotta, Vallejo, Waldspurger, Carreras). In addition, on that date she attempted to and did make contact with three strikers not named in the complaint (Lingenfelter, Fillman, Barber), and unsuccessfully tried to reach a fourth (Camburn). The record fails to show whether her November 22 reference to ''the first group'' was limited to those she had already been able to reach, those whom she had tried to reach, those whom Respondent planned to recall effective November 29, or some other ''group.''

[85] *Kennedy & Cohen of Georgia, Inc*., 218 NLRB 1175, 1176 (1975), also cited by Respondent, found that the employer had lawfully withheld an offer of reinstatement to an economic striker whose job had been filled by a supervisor who after the strike had been transferred into that job for a nondiscriminatory reason. The decision does not suggest that the employer was subject to (let alone violated) any duty to bargain; and (unlike here) the filling of that job by a supervisor as to the poststrike period did not constitute an unfair labor practice in and of itself.

charge its burden of establishing this defense to its delay in recalling such strikers.

Thus, 4 months or more before the effective recall date (April 10, 1989) of the first striker recalled in 1989, Respondent received resignations from six strikers (Camburn, Fillman, Barber, K. Smith, Prince, and Burycz) who had told Respondent that they would accept recall effective on various dates between November 29 and December 5, 1988, but who never did report to work after the strike.[86] Indeed, the contention in Respondent's opening brief that, in effect, Respondent was prepared to offer reinstatement effective by about December 7, 1988, to all the strikers whom Iltis attempted to contact on or before that date indicates that after December 7, Respondent had a total of 11 vacancies, 1 for each of the 11 strikers whom she called on or before December 7 but who resigned or failed to return. Moreover, beginning on November 29, 1988, and continuing until at least the August 1989 hearing, Heat Treat Supervisors Richard Cressman and Walter Bates spent 6 to 8 hours a day performing the unit work of loading and unloading furnaces, driving forklifts, operating blasters, and performing a function known as masking. The same was true of Supervisor Jerry Babalock after December 5, 1989. Between the end of the strike and Christmas 1988, Personnel Manager Iltis spent 3 or 4 hours a day doing the unit work of operating blasting machines. During this same period, Production Manager David Brough spent 12 hours a day operating furnaces; between Christmas 1988 and February 1989, he spent 8 hours a day at this work; and thereafter he cut his hours back to 4 hours a day 2 or 3 days a week and 7 hours a day the rest of the time. The work performed by Brough requires no special training, and can be performed by anyone if instructed to do it. Further, after the strike ended, salesman Jerry Farra, a nonunit employee, worked in the shipping and receiving department, where he loaded and unloaded trucks, and also loaded and unloaded baskets for the all case line and did some masking and blasting. He performed such work for 2 hours a day and 3 or 4 days a week until Christmas 1988, and thereafter performed such work 1 or 2 days a week until April 1989, the month of the 1989 recalls. Before the strike, the work described in this paragraph had been performed primarily by furnace operators, furnace helpers, and utility workers; had been performed by these supervisors very infrequently; and had never been performed by Farra. During their respective periods of prestrike employment, the jobs of furnace operators, furnace helpers and/or utility workers had been performed by Roeder, Michie, Pierre, Kaminski, and Audain, none of whom was recalled until March 1, 1989, at the earliest. Moreover, Hoelscher's and Iltis' testimony shows, in effect, that Respondent anticipated that the work encompassed by a number of prestrike separate job classifications could be performed after a half-day's training at most, by the ''utility worker'' job classification unilaterally established by Respondent after the strike.[87] Of the seven strikers who were not recalled until 1989 and who in fact reported to work, all but L. Hendricks were recalled as utility workers.[88] Although L. Hendricks was recalled as a ''material handler,'' in November 1988 Respondent had recalled striker Frederick as a ''material handler'' even though his prestrike classification (furnace helper) was encompassed within the poststrike classification of ''utility worker,'' and there is no evidence that he had ever held either of the prestrike classifications (shipper-receiver and lift truck operator, both of them classifications in which L. Hendricks had worked) which Respondent had merged into the poststrike ''material handler'' classification. Furthermore, employee Heil credibly testified that a material handler (a classification which B. Hendricks had also filled before the strike) could perform masking and blasting, could help load and unload baskets for the furnaces, and could run the belt furnaces.

Moreover, between December 5, 1988, and Christmas 1988, Supervisor Ken Kreuson (not to be confused with discriminatee Raymond Kreuson, Ken's brother), who before the strike performed no bargaining unit work, worked 6 or 7 hours a day performing bargaining unit work on the fixture and straightening table. After Christmas 1988, and until at least August 1989, Ken Kreuson performed this work 2 or 3 hours a day. Also, between December 5, 1988, and at least April 1989, Supervisor Sandy Zigon spent an hour a day performing the bargaining unit work of wrapping packages for pickup by the United Parcel Service. In addition, between December 5, 1988, and February 1989, she spent up to an hour a day performing the bargaining unit work of driving a lift truck and unloading cans. Also, between December 5, 1988, and Christmas 1988, Safety Program Director Dennis Nace spent between 6 and 8 hours a day performing the unit work of loading and unloading trucks. Furthermore, between December 5, 1988, and March 1989, Company President Rex spent 3 or 4 hours a day, 4 days a week, performing the unit work of operating a Brinell testing machine. Finally, after the strike and until at least the August 1989 hearing, maintenance supervisor Sid Heflin worked 8 or 9 hours a day in the induction department performing unit work which consisted of operating the induction machine and performing setups. Before the strike, striker Kaminski had operated this machine and done some minor setups. Although he had never performed some of the setups work performed by Heflin, Respondent failed to show what proportion of Heflin's poststrike work consisted of this latter kind of setups, whether Kaminski could have learned to perform them, or how long it would have taken him to learn.[89] Although Rex testified that some of the work performed by nonunit personnel

[86] The record fails to show the prestrike jobs of any of these employees except Camburn, part of whose job called for skills not possessed by the strikers whose recall was delayed until 1989. However, as discussed infra, Respondent continued to have such tasks performed by a supervisor who began to perform them during the strike. The record fails to show that after the end of the strike, a job could not have been opened up for one of the 1989 returnees by assigning such tasks to a striker who returned to work in 1988 or to a permanent replacement, or by training one of the 1989 returnees to perform them.

[87] Namely, maintenance helper, lift truck operator, furnace helper, induction and flame helper ''St.-Fixture Helper,'' furnace operator ''Prod.,'' inspector B, blaster, production utility worker, helper shipper-receiving, janitor/laborer.

[88] Although B. Hendricks' personnel record states that he was recalled as ''Heat Treat,'' no such job title was used in Respondent's poststrike classification system. His personnel record further states that he was recalled as labor grade 1, which Respondent's poststrike wage structure applied to utility workers only.

[89] Heflin had had almost no experience with the induction machine prior to the strike, and had had to teach himself to perform setups on that machine while the 2-month strike was in progress.

from December 1988 through January 1989 was experimental in nature, Respondent failed to identify what and how many hours' work he was referring to. Moreover, although Rex testified in September 1989 that as of that date about 15 percent of Respondent's ''total volume'' represented work (performed for a single customer) which over a 3-month period had been performed almost entirely by nonunit personnel because of the number of variables involved, there is no evidence as to the number of man hours involved, and his somewhat vague testimony as to dates suggests that Respondent did not begin to perform the work in question until after all the discriminatees had been recalled.

Furthermore, when a vacancy in the job of inspector was created by the resignation on January 27, 1989, of third-shift inspector Antonacio, Respondent did not offer that job to unrecalled striker David Michie, who had been an inspector just before the strike, or to unrecalled strikers B. Hendricks and L. Hendricks, both of whom had performed the job in the course of their prior employment. Instead, and even though at the time of Antonacio's resignation she was ''going crazy trying to keep up with'' her job,[90] inspector Mary Denton was transferred from the second to the third shift, and regularly came in early and worked the last 2 hours of the second shift. At the same time, first-shift inspector Victor Lopez began to regularly stay late and work the first 2 hours of the second shift. During the 4 hours of the second shift when no inspector was present, nonunit quality control employees performed some inspection work. This transfer of unit work to nonunit employees, and this rearrangement of duties between, and increase in hours assigned to, admitted bargaining unit employees, do not constitute a defense to Respondent's failure to recall strikers after Antonacio's late January resignation. *Greater New Orleans Artificial Kidney Center*, 247 NLRB 973 fn. 2 (1980).

For the foregoing reasons, I find that Respondent also violated Section 8(a)(1) and (3) of the Act by delaying the reinstatement of the eight strikers listed in Conclusion of Law 6, infra, as having been recalled in 1989, between November 16, 1988, and such 1989 dates, which are established by the amended pleadings.

3. Respondent's alleged independent violation of Section 8(a)(1) of the Act

I agree with the General Counsel that Company President Rex's interrogation of returning strikers about their reasons for returning constituted a violation by Respondent of Section 8(a)(1) of the Act. Thus, the questioning was conducted by Respondent's top ranking executive, and in the presence of Respondent's personnel director and many (if indeed not all) of its supervisors and managers, in groups of 7 to 11 employees whom management had instructed to attend such meetings in a plant area where at least most of them did not ordinarily work. None of the employees at any of the meetings replied to Rex's question to the group about their reasons for returning, and every one of them was thereupon questioned individually about the matter. Respondent's personnel director made a permanent record of many of the replies, in a manner which showed the returning strikers what she was doing. Respondent's reasons for making such a permanent record were not explained to the returning strikers, and Respondent has not tendered a legitimate reason for making this particular matter a subject of President Rex's questions. The meetings were held at the end of an unsuccessful strike during which Respondent had engaged in bad-faith bargaining in the very presence of two of the interrogated returning strikers, and such meetings served as a means of conveying to the returning strikers Respondent's unlawful unilateral effectuation of many of the proposals which were the subject of such bargaining. All of the interrogated employees were returning strikers whose recall Respondent had unlawfully delayed until dates from 13 to 19 days after the strikers' offer to return. Rex began the first meeting by complaining about the strike and expressing doubt that he wanted the strikers to come back at all; he stated at all the meetings that by working during the strike, the ''non-union'' employees had saved the returning strikers' jobs; and he stated at all the meetings that his prestrike feeling of a strong obligation to provide continued employment may have been undermined by a long strike which followed a unanimous rejection of what he believed to be the best contract Respondent could offer, and by the ''ugliness'' on the picket line. Further, when Rex asked striker Antonacio individually why she had bothered to return, she gave an obviously evasive reply—namely, that she was not sure she was back. In view of all the foregoing, I conclude that Rex's interrogation of the returning strikers about the reasons for their return constituted proscribed interference, restraint, and coercion. See generally *Hunter Douglas, Inc. v. NLRB*, 804 F.2d 808, 816–817 (3d Cir. 1986), cert. denied 486 U.S. 1014 (1987), and cases cited; *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985).

No different conclusion is suggested by the honest testimony of returning striker E. J. Smith that he did not feel threatened by Rex's question about why Smith had returned. Whether particular conduct violates Section 8(a)(1) turns, not on its actual effect, but on whether it had a reasonable tendency in the totality of the circumstances to intimidate. *NLRB v. Keystone Pretzel Bakery*, 696 F.2d 257, 259–260 (3d Cir. 1982); *Hedstrom Co. v. NLRB*, 629 F.2d 305, 314 (3d Cir. 1980), cert. denied 450 U.S. 996 (1981); *Benjamin Coal Co.*, 294 NLRB 572, 583 fn. 27 (1989). In any event, ''As to this sort of testimony, it has been observed that a feeling by employees 'that they were under no sense of constraint . . . is a subtle thing, and the recognition of constraint may call for a high degree of introspective perception.''' *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 231 (1947); see also *Radio Officers v. NLRB*, 347 U.S. 17, 51 (1954). I note that counsel did not ask Smith why he answered this question by Rex only after being questioned individually, and not when Rex posed it to the group.

I find no merit to Respondent's contention that Rex's questions were not unlawful because they allegedly did not implicate employees' Section 7 rights. Rex's questions about why the questioned employee chose to return to work were directed to employees who had participated in the admittedly protected concerted activity of a strike for the purpose of inducing Respondent to make a better contract offer to the union which represented them, and who had returned to work after that union's reinstatement requests, and notwithstanding

[90] Before the strike, Respondent had employed one inspector on each of the first two shifts and two inspectors on the third shift. Immediately after the end of the strike, Respondent employed one inspector on each shift.

the employees' action, in further exercise of their Section 7 rights, in rejecting Respondent's most recent proposed contract. Under these circumstances, Rex must have anticipated that some employees' explanations of why they had returned would reveal their at least individual views about union representation and/or the Union's tactics. Furthermore, Rex must have realized that in this setting, some returning strikers might believe (even if erroneously) that their views about these union matters were being solicited, and some returning strikers might conceal, minimize, or otherwise misrepresent, the role which their union views played in their decision to return. Moreover, Iltis' flip chart states that one employee said he had returned because he was unhappy with the union leadership; and another, stated that he had returned pursuant to the Union's offer to return (which reply Iltis' flip chart summarized as ''offer was made to return'').

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The International and Local (jointly called the Union) are labor organizations within the meaning of Section 2(5) of the Act.

3. The unit referred to in article I of the collective-bargaining agreement between the Union and Respondent effective between September 15, 1985, and September 17, 1988, is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. By virtue of Section 9(a) of the Act, the Union is now, and has been at all times material herein, the exclusive representative of the unit described in Conclusion of Law 3 for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

5. Respondent has violated Section 8(a)(5) and (1) of the Act in the following respects:

(a) Failing and refusing to bargain in good faith with the Union, with respect to the unit described in Conclusion of Law 3, on and after November 7, 1988.

(b) Failing to honor the Union's requests, on November 16 and 21, 1988, for continued negotiations with respect to that unit.

(c) Unilaterally taking the following actions with respect to that unit without the existence of a legally cognizable impasse: (1) establishing minimum wage rates; (2) reducing the number of labor grades; (3) changing job classifications and job descriptions; (4) modifying its job evaluation policy; (5) changing wage rates of group leaders; (6) instituting a sales bonus plan; (7) changing wage hour guarantees; (8) changing the overtime policy; (9) changing the training period rate progression; (10) changing the temporary transfer policy; (11) changing the recall, layoff, and bumping practices; (12) instituting a policy regarding the recall of striking employees; (13) changing the seniority policy; (14) changing the vacation replacement policy; (15) changing holiday pay and vacation policy; (16) instituting a merit increase policy; (17) abandoning the prior practice of paying pro rata vacation pay to employees who quit; (18) imposing a new requirement that bargaining unit production employees (rather than bargaining unit janitors) empty such production employees' trash cans; and (19) changing the practice in connection with the performance of unit work by supervisors.

(d) Unilaterally permitting the unit work of loading and unloading trucks to be performed by truckdrivers not employed by Respondent.

6. Respondent has violated Section 8(a)(1) and (3) of the Act by delaying the reinstatement of the following employees between November 16, 1988, and the dates after their respective names:

Ann Antonacio	November 29, 1988
Joel Audain	April 10, 1989
Charles Ball	December 1, 1988
Joe Bennett	November 30, 1988
Jose Carreras	December 1, 1988
Alan Clarke	December 1, 1988
Terry Copenhauer	November 29, 1988
George Cute	December 5, 1988
Mary Denton	November 30, 1988
Anthony Famularo	December 5, 1988
Thomas Felder	November 29, 1988
Tod Frederick	December 5, 1988
David Gerhart	April 3, 1989
Carson Heil	December 5, 1988
Brian Hendricks	April 19, 1989
Lucien Hendricks	April 24, 1989
Robert Hinkle	November 29, 1988
John Hodum	November 29, 1988
J. Paul Homan	November 30, 1988
Gary Kaminski	April 19, 1989
Raymond Kreuson	December 5, 1988
Arland Landis	December 5, 1988
Alfred Leotta	November 29, 1988
Victor Lopez	December 1, 1988
Willie Lott	November 30, 1988
Thomas Mastromatto	December 1, 1988
David Michie	April 3, 1989
John Novotny	November 30, 1988
William Ordille	December 5, 1988
Damascene Pierre	April 17, 1989
Robert Reynolds	November 29, 1988
Marcelo Rivera	December 1, 1988
John Roeder	March 1, 1989
Rogelio Rosa	December 1, 1988
Harold Samuelson	December 5, 1988
Gary Schoch	December 5, 1988
Albert Smith	November 30, 1988
Esau J. Smith	December 5, 1988
William Stotsenburgh III	December 8, 1988
Jose Vallejo	November 30, 1988
Eugene Waldspurger	November 30, 1988
Charles Zeigler	November 29, 1988

7. Respondent has violated Section 8(a)(1) of the Act by interrogating employees about protected activity.

8. The unfair labor practices described in Conclusions of Law 5–7 affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. Respondent has not violated the Act with respect to the elimination of paid lunchbreaks, or by changing its health insurance benefits, its pension plan, and its policy regarding arbitration costs.

THE REMEDY

Having found that Respondent has violated the Act in certain respects, I shall recommend that Respondent be required to cease and desist therefrom, and from like or related conduct, and to take certain affirmative action necessary to effectuate the policies of the Act.

Respondent will be required, on the Union's request, to rescind the unlawful unilateral actions taken by it; but nothing in this Order is to be construed as requiring Respondent to cancel any improvements in wages or other remuneration without a request from the Union. In addition, Respondent will be required, on request, to bargain with the Union in good faith. Also, Respondent will be required to make employees whole for any losses they may have suffered by reason of Respondent's unlawful unilateral changes, and by reason of Respondent's unlawful delay in offering to recall strikers. Because Respondent unduly delayed its recall offers, the 5-day grace period which Respondent would otherwise have been allowed to effectuate their return in an orderly manner serves no useful purpose, and backpay will begin to run as of the November 16, 1988, offer to return. *Harris-Teeter Super Markets*, 242 NLRB 132 fn. 2 (1979), enfd. 644 F.2d 39 (D.C. Cir. 1981); *Tall Pines Inn*, supra, 268 NLRB 1392 fn. 3; *Associated Grocers*, supra, 253 NLRB at 34.[91] All sums due under this Order shall include interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Loss of pay due to interruption or cessation of active employment is to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). In addition, Respondent will be required to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[92]

ORDER

The Respondent, J. W. Rex Company, Lansdale, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about protected activity in a manner constituting interference, restraint, or coercion.

(b) Discouraging membership in United Steelworkers of America, AFL–CIO–CLC, or Local Union No. 5621, United Steelworkers of America, AFL–CIO–CLC (jointly called the Union), by delaying the reinstatement of strikers who have unconditionally offered to return, or by otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment.

(c) Failing and refusing to bargain in good faith with the Union with respect to the unit referred to in Article I of the collective-bargaining agreement between the Union and Respondent effective between September 15, 1985, and September 17, 1988.

(d) Failing to honor requests by the Union for continued negotiations with respect to that unit.

(e) Without the existence of a legally cognizable impasse, making unilateral changes with respect to minimum wage rates; the number of labor grades; job classifications and job descriptions; job evaluation policy; wage rates of group leaders; sales bonus plan; wage hour guarantees; overtime policy; training period rate progression; temporary transfer policy; recall, layoff, and bumping policies; policy regarding the recall of striking employees, seniority policy; vacation replacement policy; holiday pay and vacation policy; merit increase policy; payment of pro rata vacation pay to employees who quit; job classifications required to empty trash cans; the practice in connection with the performance of unit work by supervisors; or any other mandatory subjects of collective bargaining, within the previously described bargaining unit.

(f) Making unilateral changes with respect to the assignment of unit work to persons not on Respondent's payroll, or any other mandatory subjects of collective bargaining, within the previously described bargaining unit, without giving the Union prior notice and an opportunity to bargain.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make the following employees whole for any loss of pay they may have suffered by reason of the discrimination against them, in the manner set forth in the remedy section of this decision:

Ann Antonacio	Arland Landis
Joel Audain	Alfred Leotta
Charles Ball	Victor Lopez
Joe Bennett	Willie Lott
Jose Carreras	Thomas Mastromatto
Alan Clarke	David Michie
Terry Copenhauer	John Novotny
George Cute	William Ordille
Mary Denton	Damascene Pierre
Anthony Famularo	Robert Reynolds
Thomas Felder	Marcelo Rivera
Tod Frederick	John Roeder
David Gerhart	Rogelio Rosa
Carson Heil	Harold Samuelson
Brian Hendricks	Gary Schoch
Lucien Hendricks	Albert Smith
Robert Hinkle	Esau J. Smith
John Hodum William	Stotsenburgh III
J. Paul Homan	Jose Vallejo
Gary Kaminski	Eugene Waldspurger
Raymond Kreuson	Charles Zeigler

(b) Upon request by the Union:

(1) Rescind the minimum wage rates and merit increase policy established about November 29, 1988.

(2) Restore the labor grades in existence until about November 29, 1988.

(3) Rescind the changes made about November 29, 1988, in (a) job classifications and job descriptions; (b) the job

[91] This is the relief requested on p. 69 of the General Counsel's opening brief. Respondent's reply brief makes no claim that such a commencement date, which accords with Board practice, is rendered improper by the General Counsel's statement on the record, on the first day of the hearing, that backpay should begin after the 5-day period. See *Sinclair Glass Co.*, 188 NLRB 362, 363 (1971), enfd. 465 F.2d 209 (7th Cir. 1972).

[92] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

evaluation policy; (c) wage rates for group leaders; (d) wage hour guarantees; (e) overtime policy (f) the training period rate progression; (g) temporary transfer policy; (h) recall, layoff, and bumping policies; (i) seniority policy; (j) vacation replacement policy; and (k) holiday pay and vacation policy.

(4) Abolish the sales bonus plan.

(5) Rescind the policy instituted about November 29, 1988, regarding the recall of striking employees.

(6) Resume the practice of paying pro rata vacation pay to employees who quit.

(7) Rescind the requirement that bargaining unit production employees empty their trash cans.

(8) Rescind the changes made, after the expiration of the bargaining agreement on September 17, 1988, in the practice in connection with the performance of unit work by supervisors.

(9) Abandon the practice of permitting the unit work of loading and unloading trucks to be performed by truckdrivers not employed by Respondent.

However, nothing in this Order is to be construed as requiring Respondent to cancel any wage or other financial improvements without a request from the Union.

(c) Make employees whole for any loss of pay they may have suffered by reason of Respondent's unlawful unilateral actions, in the manner set forth in the remedy section of this decision; as to the unilateral abandonment of the practice of giving pro rata vacation pay to employees who quit, the payees are to include, but not be limited to, Ann Antonacio, Edward Camburn, John Fillman, and Kenneth Smith.

(d) On request, bargain in good faith with the Union as the exclusive representative of the employees in the foregoing appropriate unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its Lansdale, Pennsylvania facility copies of the attached notice marked ''Appendix.''[93] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that paragraphs 12(a)(vii), (xix), and (xxi) of the complaint are dismissed.[94]

[93] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[94] The complaint contains two paragraphs numbered 12(a)(xxi), both of which are dismissed. The complaint contains no par. 12(a)(xx).